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DIGITAL TRADE AND DEVELOPMENT: A way forward for Africa at a continental and multilateral level

Abstract

This paper argues that digital trade can benefit developing countries and result in substantial financial gains. The regulation thereof has been at the forefront of negotiations at the multilateral level and within regions of Africa. While developing economies do not typically reap the benefits of digital progression, this paper proposes that digital trade can be developed in such a way so as to prioritise the developmental considerations of Africa specifically.

Through observing the progress of the WTO platform for digital trade, namely the Work Programme on Electronic Commerce, it is seen that the multilateral regulation of digital trade is a complex task. Developing country participation at this level is essential to the sustainable development of digital trade. Within Africa, there have been notable advancements in the regulation of digital trade, evidenced by the establishment of COMESA's Digital FTA.

The considerations for the advancement of digital trade for a developing continent are numerous as not only do the traditional barriers to trade still remain a primary concern but there is also the potential threat of furthering the existing digital divide that persists between the developing and the developed world. Therefore, the paper proposes that should Africa consider developing digital trade through AfCFTA (the African Continental Free Trade Agreement) digital trade in services should be prioritised ahead of digital trade in goods. This would help overcome Africa's trade facilitation and development challenges and advance Africa's position in the multilateral trading system.

Chapter One: INTRODUCTION

1.1. Digital trade and development

Digital trade, as an advancement from the traditional forms of trade propelled by continuous technological advancements, has many benefits which result in substantial financial gains.[1] These extend to, but are not limited to, the reduction of costs in transacting, shortened procedures, increased market penetration, unlimited connectivity and continuous innovation.[2] These benefits have been used by companies, organizations and even countries to their economic advantage and have created the need to reconsider and continuously develop the regulation of digital trade.[3]

Despite the above-mentioned advantages of trading digital, as with most areas in trade, developing countries do not reap the equivalent benefits of digital trade participation when compared to those of the more developed nations.[4] They face numerous issues that are related to their level of economic and industrial development. It will be seen, that even where developing economies do have the fundamental requirements in place which facilitates their participation, they are often still unable to reap the rewards of digital trade.[5] This is significant for Africa, as a continent comprised of developing and least developing nations.[6] The region of Southern Africa alone, has the highest number of least developed countries in the world.[7] Notwithstanding these challenges, there is great potential to advance digital trade.

The regulation of digital trade is in its infancy in Africa. The developmental considerations can be made a priority at an early stage in any regulatory advancements. This may, in time, afford the developmental issues greater weight and consideration in the negotiations in the multilateral trading system. From a more practical side, it shall be seen that digital trade and digitization in general has the capability of

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[1] Jorge Arbache 'Seizing the benefits of the digital economy for development' *ICTSD Digital Economy* 8 June 2018, available at *https://www.ictsd.org/opinion/seizing-the-benefits-of-the-digital-economy-for-development*, accessed on 21 December 2018.
[2] Ibid.
[3] This is seen by the recent digital developments of the WTO and of regional groupings such as COMESA.
[4] Op cit note 1.
[5] See section 5.4 below.
[6] See country statistics of *The World Bank* available at *https://www.worldbank.org/en/region/afr*, accessed on 14 January 2019.
[7] Roy Katayama & Divyanshi Wadhwa 'Half of the world's poor live in just 5 countries' *The World Bank, The Data Blog* 9 January 2019, available at *http://blogs.worldbank.org/opendata/half-world-s-poor-live-just-5-countries*, accessed on 14 January 2019.

progressing at a rate whereby certain industrial structures, which would previously be lacking in developing nations, are no longer needed.[8]

The lack of access to markets, as a result of geographical location or inadequate resources, is a significant barrier to developing countries' participation in trade. By its very nature, digital trade removes the distance between the parties to the transaction, except where physical delivery is still required. In many instances, internet connectivity replaces the need for physical infrastructures required in traditional trade. The effect of digital trade in facilitating market access has been aptly displayed by the integration of MSME's into the digital economy.

> Studies show that MSMEs that use on-line platforms are around five times more likely to export than those in the traditional economy. Empirical research also finds that companies connected to the global economy are more productive and contribute to the development of more prosperous communities. Small businesses and entrepreneurs in developing economies are already at the forefront of this emerging trend.[9]

The integration of MSME's into the digital economy is just one practical example of digital trade's potential to advance developmental objectives. However, it will be seen that Africa's experience in digital trade, or lack thereof, is particularly complex as there are several other considerations, such as regional integration, that are relevant to the discussion. The fundamental consideration of development in digital trade shall be the objective of the subsequent research.

1.2. Research objective

The broad, overarching question that this paper aims to respond to is: how can Africa develop a framework for digital trade in order to respond to the international technological advancements in trade while addressing the developmental challenges it faces as a continent? The international advancements refer to the development of digital trade at the multilateral level while the developmental challenges refer to the internal digital progression at a continental level. As the research objective is broad and all-encompassing, there are sub questions and considerations to guide the analysis.

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[8] See section 3.2 below.

[9] ICC 'WTO Business Focus Group 1: MSMEs and E-commerce' (2016) *Trade Dialogues: Final Report* at 2.

The correlation between digital trade and development was established above yet the question remains as to whether *Africa* can develop and utilise digital trade in such a beneficial, trade facilitating way. While in theory it is highly plausible, in practice it is not so clear as there are justifiable concerns regarding the possible adverse effects of the development of digital trade and there are many considerations to take into account. Therefore, one needs to proceed in such a way that advances the continent's digital capabilities while constantly prioritising its developmental agenda.

It would be useful to consider if the above advancement would be able to serve not only the continent's internal needs but also constitute a platform that is able to adequately represent the needs of Africa in the multilateral trading system and global digital economy. As such a platform would automatically involve considerations found in the process of regional integration,[10] it is necessary to consider the potential relationship between digital trade and regional integration in Africa.

1.3. Structure

Chapter one aims to introduce the topic and emphasise the need to consider digital trade in the light of development considerations. It highlights the main research objective which motivates the following sections. Chapter two aims to define certain terms and concepts, such as digital trade, e-commerce and free trade areas for goods and services, that are essential to the understanding of digital trade. The definitions and descriptions not only provide clarity but also inform the scope of future development and regulation of digital trade.

Chapter three assesses the impact of Industry 4.0 on the market and how it has prompted the growth from traditional forms of trade to digital trade. Prominent companies that have leveraged technological developments to their benefit are briefly observed, within Africa and in the broader international sphere. As this paper aims to consider the future of digital trade in Africa specifically, the recent regulatory development of COMESA's Digital Free Trade Area is examined before observing the correlation, if any, between the development of digital trade and trade facilitation.

Chapter four examines the World Trade Organisation's (WTO's) provisions on electronic commerce, which is their preferred term as opposed to 'digital trade.' As

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[10] See chapter 6 below.

the WTO is the only organisation that establishes multilateral trading rules which inform the global system, examining its work is essential to evaluating Africa's position in future digital trade developments. The most significant work of the WTO is the Work Programme on Electronic Commerce which was established in 1998 and remains in force today, ten years later.[11] The Work Programme's progress will be examined through the reports of the designated WTO bodies before observing the equivalent of the various Ministerial Conferences, culminating with the most recent one in Buenos Aires in 2017.[12]

Chapter five will evaluate the developing country concerns in light of the development of digital trade. As the developing countries' concerns reflect upon their current position in the multilateral trading system, their growth shall be briefly observed from the time of the Doha Round to the most recent Ministerial Conference.[13] While the developmental issues shall be discussed throughout the paper, this section aims to assess them in greater detail with respect to the traditional barriers to trade that are still relevant in the digital sphere and the potential of furthering the digital divide between the developing and the developed. The Africa Group's submission to the WTO[14] is examined as it is a continent-wide representation of developmental concerns for the advancement of digital trade at the multilateral level.

Chapter six places digital trade in the context of regional integration in Africa and aims to explain how the development of the former can facilitate the progression of the latter. The regional integration movement in Africa is explained before observing the numerous challenges that have been encountered. The way forward for digital trade in Africa shall be touched upon, before a formal suggestion is proposed in the subsequent chapter, by analysing whether a continental FTA or the regional economic communities (RECs) would be in the best position to further the development of digital trade.

Chapter seven concludes, by summarising the main observations and making formal propositions that respond to the various challenges faced by Africa in the development of digital trade. The suggestions aim to not only address continental

[11] Work Programme on Electronic Commerce, 1998.
[12] The 11th Ministerial Conference 2017 held in Buenos Aires.
[13] Ibid.
[14] Statement by the African Group on the Work Programme on Electronic Commerce, 20 October 2017 (JOB/GC/144).

development but also take account of Africa's position and capability to participate in the multilateral trading system within the realm of digital trade. As this paper will not be able to cover the entirety of the future potential of digital trade in Africa and the continuing relationship with development, some proposals will be put forward for further consideration.

Chapter Two: DEFINITIONS AND CONCEPTS

2.1. Introduction

Digital trade does not have a single, all-encompassing definition. E-commerce does not have a conclusive definition either and to further complicate matters the terms are often used interchangeably.[15] Nevertheless, the various definitions and descriptions used by some of the main organizations and institutions shall be explored in order to establish what future regulations surrounding digital trade may include or exclude. These definitions are also relevant for measuring the form of trade and it has been established that a lack of consensus on the scope of these definitions does not bode well for an attempt to create accurate digital trade statistics.[16] The general formation of a Free Trade Area (FTA) is discussed in terms of goods and services in order to understand the basic components of a potential digital FTA.

2.2. Digital trade

A narrow interpretation of the term digital trade only pertains to trade in actual 'digitized products.'[17] It is clear that business' needs surpass this interpretation and a broader view including the 'use of digital technologies (ICTs) to conduct business'[18] would appear to be more suitable. McKinsey, in its research, has used 'cross-border data flows'[19] as a medium to calculate the growth of digital trade. This is exceptionally broad to the extent that it would even cover personal communications that are collected as a part of the data flow.

It could be argued that the data flow approach is perhaps too inclusive, as defining digital trade in such a way goes against the basic definition of 'trade' itself, which presumes there is an exchange in the normal business context. A mere transfer of data does not equate to digital trade. If this were to be the case, digital trade would be a disastrous sphere inundated with irrelevant surplus information, not to mention the likelihood of uncontrollable privacy breaches. Due to the fact that the informing

[15] UNESCAP '*Asia-Pacific Trade and Investment Report 2016: Recent Trends and Developments*' (2016) ch 7 at 107, Box 7.1.
[16] Ibid at 105.
[17] Op cit note 15, Box 7.1.
[18] Ibid.
[19] James Manyika, Jacques Bughin & Susan Lund et al, 'Global flows in a digital age: How trade, finance people, and data connect the world economy' 2014 *The McKinsey Global Institute* at 11-13, as cited by UNESCAP ibid.

literature often refers to e-commerce as opposed to digital trade, a few attempts at defining e-commerce shall be examined.

2.3. E-commerce

There are several definitions of e-commerce that seem to have similar basic attributes although they would yield different results if they were to be used for analysis in respect of growth and development. The World Trade Organisation (WTO), through the Work Programme on Electronic Commerce adopted in 1998,[20] held that e-commerce would be defined as the following: 'Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term 'electronic commerce' is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means.'[21] This definition is broad, non-specific and seemingly all-encompassing.

The Organisation for Economic Cooperation and Development (OECD), in contrast, has adopted a slightly more limiting definition of e-commerce which is 'the sale or purchase of goods or services, conducted over computer networks specifically designed for the purpose… the payment and the ultimate delivery of the goods or services do not have to be conducted online.'[22] The OECD, unlike the WTO, excludes other aspects *not* specifically relating to sale and purchase, such as the production and advertising.

The United Nations Conference on Trade and Development (UNCTAD) follows suit in this regard and defines e-commerce as 'purchases and sales conducted over computer networks, using multiple formats and devices, including the web and electronic data interchange… E-commerce can involve physical goods as well as intangible (digital) products and services that can be delivered digitally.'[23]

[20] This is discussed at length in chapter four.
[21] Op cit note 15.
[22] Ibid at 106
[23] Ibid.

2.4. Free trade areas for goods

Free trade areas (FTAs) for goods exist as a part of the 'regional trade exceptions'[24] which allow departures from certain WTO rules, most notably the MFN provision in Article I of the General Agreement on Tariffs and Trade, referred to as the GATT. A FTA is a region in which a group of countries have signed an agreement to have reduced or eliminated trade barriers, such as tariffs, between them while maintaining separate tariffs with countries that are not party to the agreement.[25] Article XXIV(8)(b) of the GATT defines a FTA for goods as the following:

> A free-trade area shall be understood to mean a group of two or more customs territories[26] in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.[27]

A FTA can be distinguished from a customs union insofar as a customs union maintains a single common external tariff for all countries not party to the customs union, meaning the tariffs are not negotiated separately like they would be in a FTA.[28] A FTA can further be distinguished from a free trade zone, which is a duty free area that supplies 'warehousing, storage, and distribution facilities for trade, transhipment, and re-export operations.'[29] While developing countries are able to make use of the *Enabling Clause* to negotiate an agreement like an FTA under slightly more favourable terms, this would not be possible when a party to the agreement is a developed country.[30]

The FTA is permitted if it meets the requirements outlined in article XXIV of the GATT[31] and 'if the formation of that FTA would be made impossible if the

[24] Peter Van den Bossche & Werner Zdouc *The Law and Policy of the World Trade Organization: Text, Cases and Materials Textbook* 4 ed (2017) 671.
[25] Article XXIV(8)(b) *GATT* 1994.
[26] A customs territory is defined by the *GATT* in article XXIV (2) as 'any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.'
[27] Supra note 25.
[28] Article XXIV(8)(a) *GATT* 1994; op cit note 24 at 681 & 686.
[29] FIAS 'Special Economic Zones: Performance, Lessons Learned, and Implications for Zone Development' 2008 *The World Bank Group* Box 1 at 3.
[30] *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller participation of Developing Countries*, 1979.
[31] Specifically, article XXIV(8)(b) & XXIV(5)(b) *GATT* 1994.

introduction of the measure concerned were not allowed.'[32] Negotiators, while adhering to WTO requirements, have to remain aware of other international requirements that the parties may be obliged to follow in respect of various multilateral conventions, rendering the negotiation a lengthy and complicated process. Apart from the requisite adherence to the WTO rules, the parties to a FTA are able to determine the extent and content of such agreement without any hindrances.

In order to create a FTA for goods, the parties to the agreement would need to decide on, amongst other things, the appropriate mechanism to use in respect of the rules of origin.[33] Rules of origin are used to determine, by the member countries, which products will be considered as having 'originated' from a specific member country and it is not an easy determination.[34] During negotiations, the parties to the agreement would have to ensure that while eliminating such trade barriers for their own members they do not actually increase trade barriers against third parties.[35] Lastly, the WTO must always be notified of any decision or attempt to enter into a free trade agreement.[36]

While there are lengthy debates as to the meaning of certain phrases used in the GATT provisions, they are not particularly important for our present discussion therefore only a brief explanation shall be provided for understanding. There is an *Understanding on Article XXIV*[37] that originated from the Uruguay Rounds that provides further clarity on the criteria and procedural steps to be taken in relation to the article. Where it is required that trade barriers must be eliminated for 'substantially all of the trade'[38] between the members, it is understood that it does not mean 100 percent of the trade. While this phrase continues to require further clarification,[39] it has been observed over the years, that the distance between 'substantially all of the trade' and 'all the trade' has decreased significantly as more barriers have been

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[32] Op cit note 24 at 686.
[33] Ibid at 458; see Annex II to the *Agreement on Rules of Origin*.
[34] Ibid at 457.
[35] Article XXIV(5)(b) *GATT* 1994.
[36] Article XXIV(7)(a) *GATT* 1994.
[37] Understanding on the Interpretation of Articles XXIV of the General Agreement on Tariffs and Trade 1994, found in Annex 1 of the Marrakesh Agreement Establishing the World Trade Organization.
[38] Supra note 25.
[39] The phrase 'other restrictive regulations of commerce' in article XXIV(8)(b) also lacks clarity but it could be argued that a broad, inclusive interpretation should be favoured in terms of international trade.

eliminated in the regional integration efforts.[40] It is generally accepted that an agreement covering 90 percent of trade is permissible.[41]

2.5. Free trade areas for services

FTAs for services generally follow the above-mentioned formation relating to an agreement concerning goods but there are, however, noteworthy differences. The agreement exists as an *economic integration agreement*, governed by article V of the General Agreements on Trade in Services, referred to as the GATS. The liberalisation of trade in services is permitted in this way, if the agreement has 'substantial sectoral coverage.'[42] In addition, such an agreement must:

> (b) provide(s) for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:
>
> (i) elimination of existing discriminatory measures, and/or
>
> (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.[43]

These requirements in terms of services differ from those applicable to goods, as article V of the GATS does not require the elimination of the regulatory measures in their entirety – only for the elimination of *discriminatory* measures, presently existing and/or potentially in the future. In other words, the section calls for national treatment between members.[44]

The requirement of 'substantial sectoral coverage,' similarly to 'substantially all the trade,' remains largely undefined although the footnote to the provision holds that it is to be 'understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.'[45] Upon satisfying the provisions, the

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[40] Op cit note 24, 28 & 32.
[41] Ibid.
[42] Article V(1)(a) *GATS* 1994.
[43] Article V(1)(b) *GATS* 1994.
[44] 'Negotiating free trade agreements: a guide' *Department of Foreign Affairs and Trade, Australian Government* at 29.
[45] Footnote 1 of article V of *GATS* 1994.

members of the FTA in services would be able to favour each other and essentially discriminate against services and providers of such services from parties that are not covered by the FTA agreement.[46] This, however, is subject to article V(6) which holds that service suppliers that are not party to the FTA agreement should enjoy the favourable treatment if they engage in 'substantive business operations in the territory of the parties.'[47]

The GATS provision regulating an FTA in services expressly acknowledges the positon of developing countries, while the GATT equivalent does not. Developing countries that are parties to an FTA agreement in services are granted flexibility in terms of meeting the requirements, in line with the developing countries' sectoral and general level of development.[48] Once again, the FTA in services should not, as a result of its formation, raise barriers towards third parties[49] and the WTO must be notified of any attempts to form an FTA in services.[50]

2.6. Conclusion

While this paper does not aim to create the ideal definition of digital trade or e-commerce, it is necessary to make a few observations. It is clear that e-commerce informs digital trade and that the two concepts cannot be completely distinguished which explains the conflation that exists in the literature. It has been seen that e-commerce, as a term, has been used more widely and has been defined by several organizations, albeit for their specific purposes.[51] It can be argued that digital trade, as a whole, remains somewhat broader than e-commerce,[52] as the regulation and limits thereof have yet to been formally established, which is harmonious with the limitless nature of digital trade.

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[46] Article V(1) *GATS* 1994.

[47] 'A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement,' see article V(6) *GATS* 1994.

[48] Article V(3) *GATS* 1994.

[49] Article V(4) *GATS* 1994.

[50] Article V(7) *GATS* 1994.

[51] For example, the definition used by the *WTO* in the Work Programme on Electronic Commerce, op cit note 21.

[52] This is supported by the research of the *Mckinsey Global Institute*, op cit note 19.

As technological developments and advancements are fast paced and somewhat unpredictable, it would be recommended to prefer a broad and inclusive definition of e-commerce and digital trade. Many devices and networks are capable of transacting in e-commerce despite it not being their specific 'purpose' or 'design.'[53] It would be detrimental to exclude such networks and their capabilities, as it would exclude them from future regulatory frameworks. It would perhaps be more appropriate to define these terms in respect of what the proposed regulation aims to achieve, meaning institution-specific definitions may in fact be the most practical way forward in light of continuous technological developments. The broad approach to defining digital trade and e-commerce should take cognisance of previous attempts. While harmonisation across regulatory platforms is desirable, it would, however, be counterproductive to hinder the progression of the digital development as a result.

With respect to the formation of an FTA, it is clear that the informing provisions may not be as simple as they appear. Lengthy negotiations would need to take place, not only in respect of the agreement but in order to determine the rules of origin mechanisms and calculations surrounding the actual reductions of trade barriers. The notion of the global value chain complicates these negotiations and placing these concepts in the digital sphere would only exacerbate the complexities. However, it can be observed that a FTA in services as opposed to goods may be easier to establish as the relevant rules are generally more lenient and specifically acknowledge the position of developing countries.

[53] This would be contrary to the *OECD* definition of e-commerce, op cit note 22.

Chapter Three: FROM TRADITIONAL TRADE TO DIGITAL TRADE

3.1. Introduction

This chapter shall aim to give a brief overview of digital trade in the market, by considering the impact of Industry 4.0 on the traditional forms of trade and identifying the leading e-commerce companies internationally and within Africa specifically. The recent regulatory developments shall be observed before examining the notion of digital trade as a form of trade facilitation, which highlights the need to further the frameworks in support of digital trade.

3.2. The impact of Industry 4.0 on trade in the market

Recent developments in trade and the momentum of digital trade are propelled by the notion of the fourth industrial revolution. The latest revolution, presented as a concept in 2011,[54] can be described as rapid change attributed to technological advances resulting in extreme connectivity, a merging of activities and an increased speed in all areas of production.[55] What differentiates this revolution from previous ones, is the immeasurable advances technology itself can bring. A simple example of this would be the evolution of the mobile phone. When the first mobile phones were created, it was not envisaged or even hypothesised that the cameras in the phones would in the future be developed to scan barcodes as a method of payment, via an app that is linked to your online banking system. Physical and digital constructs are conflated as the internet of things[56] and provide seamless interconnectivity in every sphere.

The growth of technology is exponential, as opposed to other developments which typically follow a linear pattern.[57] The benefits of such growth also develop exponentially and it is possible, if not probable, that the 'rate of change itself is accelerating.'[58] A defining feature of technology is the inconceivable possibility that

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[54] Andreja Rojka 'Industry 4.0 Concept: Background and Overview' (2017) 11 *International Journal of Interactive Mobile Technologies* 77 at 80.
[55] Klaus Schwap 'The Fourth Industrial Revolution: what it means, how to respond' *Word Economic Forum* 14 January 2016, available at *https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/*, accessed on 24 September 2018.
[56] Roblek, Maja Meško & Alojz Krapez 'A Complex View of Industry 4.0' 2016 *SAGE Open* 1.
[57] Ray Kurzweil 'The Law of Accelerating Returns' 2001, available at *http://www.kurzweilai.net/the-law-of-accelerating-returns*, accessed on 24 September 2018.
[58] Ibid.

it holds within itself. The most successful businesses have utilised the benefits of technology to leverage themselves in the market.[59]

Assessing the market for a particular sector would typically involve looking at the product dimension[60] to identify potential substitutable goods or services and the geographical dimension[61] to assess the scope of the potential competition. Upon defining the relevant market, one would be able to assess a firm's market power.[62] However, this analysis becomes increasingly complex when evaluating products and services that fall within the scope of electronic commerce.[63] The impact of electronic commerce, on both the product and geographical dimension, is significant as it has the potential to create limitless substitutability and blur the lines of the traditional physical scope.

Internationally, Alibaba.com (Alibaba) and Amazon.com (Amazon) are innovative companies that are the competing leaders in the field of e-commerce, from China and America respectively.[64] They have successfully used technological advancements to pursue not only interrelated business activities[65] but other ventures such as cloud computing and data analytics. The e-commerce giants differ substantially both in their operations and objectives and have expanded in-line with the latter. It is interesting to note that Alibaba, for the most part, acts as an intermediary and a facilitator as it was envisioned and designed to empower SMEs in China.[66]

In South Africa, it has been established that approximately 46 percent of shoppers use online platforms in 2018.[67] Naspers, a broad-based multinational internet

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[59] Adam Rogers 'Innovation Case Studies: How Companies Use Technology To Solidify A Competitive Advantage' *Forbes Technology Council* 13 April 2018, available at *https://www.forbes.com/sites/forbestechcouncil/2018/04/13/innovation-case-studies-how-companies-use-technology-to-solidify-a-competitive-advantage/#26a7cd821410*, accessed on 24 September 2018.
[60] Kelly (ed), Unterhalter & Goodman et al *Principles of Competition Law in South Africa* (2017) 86.
[61] Ibid.
[62] Ibid at 83-4.
[63] Aleksandra Belousova *Relevant Market: the application to the E-commerce area in the EU* (unpublished Master Thesis, Aaurhus School of Business, 2010).
[64] See Alibaba, available at *https://activities.alibaba.com/alibaba/following-about-alibaba.php?spm=a2700.8293689.0.0.2ce265aa6LRSjp*; and Amazon, available at *https://www.aboutamazon.com*, accessed on 24 September 2018.
[65] Amazon, in particular, has internalised many processes and developed its own logistics system.
[66] Feifei Xu *Alibaba vs. Amazon: A business model comparison* (unpublished Master Thesis, Louvain School of Management, 2016) 72.
[67] Ecommerce Forum Africa *E-commerce Industry Report 2017*, available at *https://cdn2.hubspot.net/hubfs/2622125/2017%20South%20Africa%20E-Commerce%20Industry%20Report.pdf*, accessed on 24 September 2018.

and media group, have led the country's e-commerce development by launching in South Africa in 1915.[68] While it started as a print business, the group has expanded exponentially and operates in over 120 countries in varying sectors and services.[69] Takelot.com launched in 2011 and is known as South Africa's largest e-commerce retailer which subsequently joined the Naspers group in 2015.[70]

Senegal, Kenya and Nigeria, alongside South Africa, are at the forefront of e-commerce on the African continent.[71] Jumia is Nigeria's largest e-commerce website that operates across 13 African countries, including Senegal.[72] Like the abovementioned e-commerce companies, Jumia has expanded across various sectors. Jumia's J-Force program is particularly innovative as it caters to the 'populations that do not have access to internet' and empowers individuals to become self-employed through the platform, whose vision is to change lives through the internet.[73] Kilimall launched in 2014 and is Kenya's largest e-commerce platform.[74] Kilimall acts as a competitor to Jumia as it expanded its operations to Uganda and Nigeria after its success in Kenya.[75]

While it is evident that e-commerce has been most prominently developed by the private sector, it shall be seen that cross-border regulations play an important role in furthering the development, especially in regions that remain unaffected by scope of the private sector's e-commerce expansion. The global e-commerce developments mentioned above may indicate a movement away from the traditional forms of trade. However, it is clear that the former will not entirely replace the latter, as age old issues that are common to literature on trade are still being experienced in the digital sphere.[76]

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[68] Naspers, available at *https://www.naspers.com/about#nasperscompanies*, accessed on 24 September 2018.
[69] Ibid.
[70] Takealot.com, available at *https://www.takealot.com/about/our-journey* accessed on 24 September 2018.
[71] This is based upon the Internet's contribution to the country's GDP. See Exhibit E3 in Manyika, Cabral & Moodley et al 'Lions go digital: The Internet's transformative potential in Africa' 2013 *McKinsey Global Institute* 5.
[72] Jumia, available at *https://www.jumia.com.ng/about_us/,* accessed on 24 September 2018.
[73] Tech Moran 'J-Force program aim to create 20,000 jobs for Kenyan youths by year-end' available at *https://techmoran.com/jumia-says-its-j-force-program-to-create-20000-jobs-for-kenyan-youths-by-year-end/* accessed on 24 September 2018.
[74] Kilimall, available at *https://www.kilimall.co.ke*, accessed on 24 September 2018.
[75] Ibid.
[76] Javier Lôpez-González & Marie-Agnès Jouanjean 'Digital Trade: Developing a Framework for Analysis' 2017 *OECD Trade Policy Papers* 18.

Theories behind international trade are still applicable to the developments in cross border transactions.

> Digitalisation and new technologies change how we trade but not why we trade. That is, trade is still subject to comparative advantage, and informational asymmetries and barriers to trade both at-the-border and behind-the-border continue to apply. However, new technologies, reducing the cost of sharing ideas across borders and connecting different actors along the value chain, are helping overcome many of the constraints associated with engaging in international markets, shifting sources of comparative advantage and leading to the adoption of new business models.[77]

Industry 4.0 has fundamentally influenced every aspect of life and it is therefore not surprising that the subsequent impact on trade operations are expansive and potentially limitless. Alongside these world-wide developments, is the need to re-evaluate and critique the established mechanisms in place that regulate and govern a system. It can be said that digital trade, as it stands, is not unregulated or even self-regulated. Various formulations of Free Trade Agreements have actually included elements of digital trade, albeit to the extent that it serves the parties' purpose.[78] The inclusion of such provisions would be seen as natural and in line with progressions made in the pursuit of free trade.

3.3. Regulating digital trade through the use of digital free trade areas

While this paper shall aim to focus on the prospects of a digital FTA at a continental level in Africa from a developmental perspective, it is motivated by the recent related developments concerning digital trade most notably by COMESA (the Common Market for Eastern and Southern Africa) and Malaysia.

COMESA announced at the end of 2017 that the plans for a Digital FTA had been finalised.[79] The COMESA Digital FTA has been modelled on the Malaysian equivalent and aims to utilise the relevant technology to assist with importing and exporting and the associated physical restraints present at borders. The Digital FTA is divided into e-regulation, e-logistics and e-trade and includes 'an electronic certificate

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[77] Ibid at 8.
[78] FTA's that regulate digital trade shall be discussed shortly and again in the following chapters.
[79] COMESA 'Digital Free Trade Area Instrument Ready for Trials in MS' available at *http://www.comesa.int/digital-free-trade-area-instruments-to-be-piloted-in-ms/,* accessed on 24 September 2018.

of origin, underpinned by blockchain technology and a mobile application for cross-border traders.'[80] From 2018, the plans were to be carried out by the majority of the member states[81] 'on the basis of the principle of variable geometry.'[82]

COMESA's Digital FTA is the first of its kind for Africa and holds much promise for the future of digital trade regulation across the continent, as one regional economic community's actions often influence the others.[83] While the plans are largely supported, they do not come without concerns and risks relating to the constraint of COMESA's resources and the progressive ambitions of the digital FTA itself.[84] Further, the transition to a digital form of trade is evidently not an expeditious process, as COMESA's electronic certificate of origin was finalised in 2017 yet it had been an on-going process since 2014.[85]

It is held that COMESA's Digital FTA is modelled on Malaysia's Digital Free Trade Zone (DFTZ) which is an initiative launched in 2017 with Alibaba.[86] The DFTZ is a project aimed at strengthening Malaysia's position as a 'regional e-commerce e-fulfilment hub'[87] that utilizes e-commerce to promote the exporting of Malaysian small and medium size enterprises' products while simultaneously attracting investment.[88] Alongside Alibaba, the DFTA has partnered with Lazada Malaysia, eRomman, and eBay which constitute the 'e-Marketplace'[89] with an intercontinental reach. While there are already notable differences between Malaysia's DFTZ and COMESA's Digital FTA relating to the objectives and capabilities of the regions, the mere existence of regulatory frameworks for digital trade highlights the potential prosperity for developing countries in varying regions.[90]

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[80] Ashley Hope 'What is COMESA's Digital Free Trade Area and should SADC have one too?' 2018 *Tralac Trade Brief* 3.
[81] Op cit note 79. The 15 out of 19 COMESA states that are participating are Burundi, Democratic Republic of Congo, Egypt, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Seychelles, Uganda, Swaziland, Zambia and Zimbabwe.
[82] Op cit note 80 at 1.
[83] Ibid at 9-10. Due to multiplicity of membership, the activity of one REC often influences another eg. COMESA and SADC.
[84] Ibid at 10.
[85] Op cit note 79.
[86] Go Global with DFTZ, available at *https://mydftz.com/programs/go-global-with-dftz/*, accessed on 24 September 2018.
[87] DFTZ, available at *https://mydftz.com*, accessed on 24 September 2018.
[88] Ibid.
[89] Op cit note 86.
[90] Despite Malaysia's economic growth and development, it is still presently classified as a developing country. See The World Bank in Malaysia, available at *http://www.worldbank.org/en/country/malaysia*, accessed on 24 September 2018.

3.4. Digital trade in pursuit of trade facilitation

It is interesting to take note of how different countries manage their digital trade, in respect of how 'open' they are, in pursuit of trade facilitation in the digital sphere. While digital restrictiveness can be measured in various ways, the Digital Trade Restrictiveness Index (DTRI) analyses over 100 categories of policy measures from 64 different countries.[91] The DTRI results are centred around four clusters,[92] with one of them being Trading Restrictions which covers quantitative trade restrictions, standards, online sales and transactions.[93]

China is found to be the most digitally restrictive country while New Zealand is found to be the most 'open' based upon the rankings across the identified clusters.[94] The only African countries to be included in the DTE database are Nigeria and South Africa, who ranked 16th and 17th respectively.[95] As the first ranking represents the most digitally restrictive country and the 64th ranking the most digitally free, one can ascertain that the African hegemonic countries fall approximately within the top quarter of the most digitally restrictive nations. The report holds that the increased digital restrictiveness of emerging economies is concerning, as it inhibits the countries from benefitting from the prosperity found in the 'data-based global economy'[96] and the digital restrictions will also have negative consequences for the non-digital economy.

The divergences between the digitally restrictive emerging economies and the digitally open more developed countries, alongside Africa's absence from the study, highlights the lack of developing-country participation in the sphere of digital trade. From a wider regulatory perspective, it can also be seen that every other continent has a fairly substantial number of regional trade agreements (RTAs) that include the regulation of digital trade, apart from Africa.[97] The RTA classification covers FTAs and customs unions. As of 2017, twenty-nine developing countries had participated in

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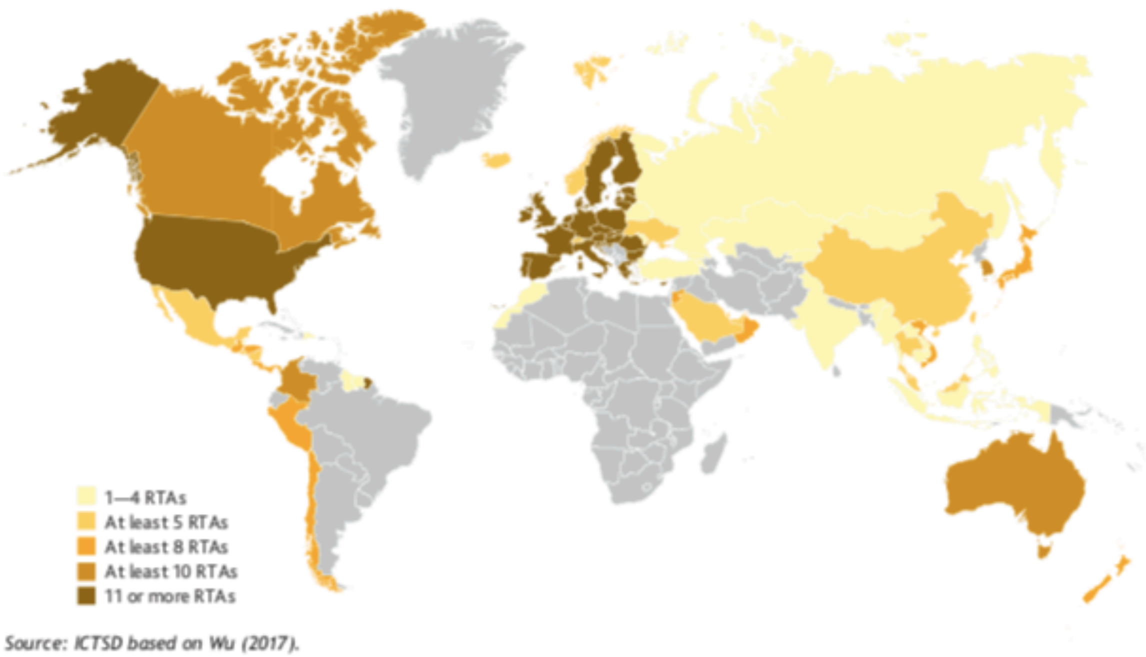
[91] Martina Francesca Ferracane, Hosuk Lee-Makiyama & Erik van der Marel 'Digital Trade Restrictiveness Index' *ECIPE* April 2018.
[92] Ibid at 11, the clusters are Fiscal Restrictions, Establishment Restrictions, Restrictions on Data and Trading Restrictions.
[93] Ibid.
[94] Ibid at 14, Table 2.1.
[95] Ibid.
[96] Ibid at 5.
[97] ICTSD 'Updating the Multilateral Rule Book on E-Commerce' (2018) *Policy Brief* Figure 3 at 4.

negotiations at this level[98] and even with the hypothetical inclusion of COMESA's recent Digital FTA initiative and the limited North African RTA participation seen below, Africa's absence would still be striking in comparison.

Figure 1. Number of RTAs that contain e-commerce provisions, by country.[99]



While Africa's lack of RTA regulation may, amongst other factors, merely reflect its limited participation in digital trade, there are particular consequences attached to this consideration when one views digital trade as a method of trade facilitation. Digitisation brings clear benefits in terms of accessibility, speed and connectivity. Many processes involved in importation and exportation can become paperless, resulting in improved faster clearance procedures.[100] While barriers will still exist for the delivery of physical goods, the related promotion and sale of the good, amongst other things, could potentially be conducted online.[101]

[98] Ibid at 3.
[99] Ibid, ICTSD based on Wu (2017). This figure does not include COMESA's recent Digital FTA formation.
[100] Kati Suominen 'Fuelling Trade in the Digital Era: Policy Roadmap for Developing Countries' 2017 *ICTSD Digital Economy* 17-9.
[101] Ibid.

Although Africa's digital capabilities in terms of regulation may seem dire based upon the above, it is clear that the private sector has successfully used e-commerce to expand their operations across the continent, albeit with a focus on certain countries.[102] As digital trade is evidently a progression from traditional forms of trade, influenced by Industry 4.0, it is crucial to Africa's development that further cross-border regulation is explored within the realm of digital trade.

[102] Ibid at 14. This is not to say that there has been no other digital development on the continent, but to emphasize the comparable achievements of the private sector. Other related digital regulatory developments are i) the East African Community Task Force on Cyberlaws; ii) ECOWAS' harmonisation of e-transactions, data protection and cybercrime; and iii) the Digital 2027 Agenda of SADC.

Chapter Four: WTO PROVISIONS ON ELECTRONIC COMMERCE

4.1. Introduction

Multilateral trading rules are essential to the functioning of international trade despite the challenges the multilateral system has faced.[103] These general rules are often the results of lengthy negotiations held at the World Trade Organization (WTO), in Geneva, and adopted at its Ministerial Conferences. The WTO, as the only global international organization engaging with multilateral rules at this level, promotes the rules in pursuit of predictable free trade.[104] It is therefore only natural, that one would look to the WTO for guidance in developing a regulatory framework for electronic commerce relating to international trade.

The Declaration on Global Electronic Commerce was adopted in May 1998 at the Second Ministerial Conference in Geneva,[105] a mere three years after the WTO itself was founded in 1995. This section will examine the steps taken by the WTO in respect of electronic commerce with a general focus on developmental considerations from 1998, when the Declaration on Global Electronic Commerce was adopted, to 2017 when the most recent Ministerial Conference was held in Buenos Aires. Although the work of the WTO cannot be examined in its entirety, this chapter aims to select and review the most important considerations in respect of electronic commerce that could be useful in assessing the general regulatory issues present in digital free trade areas for developing countries.

4.2. The Work Programme on Electronic Commerce

The Declaration on Global Electronic Commerce instructed the General Council to form a Work Programme on Electronic Commerce, hereafter referred to as the Work Programme, which would function as a system evaluating the trade related issues that arise in electronic commerce within the multilateral system.[106] The identified issues were not a closed list[107] and members were able to address their own issues relating to trade and electronic commerce through the Work Programme. While the General

[103] Ann Capling & Richard Higgott 'Introduction: The future of the multilateral trade system – what role for the World Trade Organization?' (2009) 15 *Global Governance* 313-325.
[104] The WTO 'About the WTO' available at *https://www.wto.org/english/thewto_e/thewto_e.htm*, accessed on 23 July 2018.
[105] Declaration on Global Electronic Commerce (WT/MIN(98)/DEC/2.)
[106] Work Programme on Electronic Commerce (WT/L/274) para 1.1.
[107] Ibid.

Council played a pivotal role in actually establishing the Work Programme and continues to periodically review it,[108] four core WTO bodies were tasked with the implementation thereof, being the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS, and the Committee for Trade and Development.[109] The Work Programme identified several issues that each of the four bodies should address respectively and the term electronic commerce,[110] as opposed to digital trade is utilised, as discussed in the previous chapter.[111]

The Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS, and the Committee for Trade and Development took the suggested list of issues further and provided feedback on their respective progress and developments, by way of various notes and reports.[112] It is helpful to observe the advancements that have been made, as they inform the present task of outlining the developing countries position in international trade within the sphere of digital trade. For this purpose, selected generalised issues from the Council for Trade in Services and the Council for Trade in Goods shall be briefly examined before evaluating the submissions of the Committee for Trade and Development at length.[113]

4.2.1. The Council for Trade in Services: Progress Report to the General Council

The Council for Trade in Services, in line with the GATS provisions, was called upon to examine various issues to the extent they are related to electronic commerce.[114] A Progress Report was adopted following the Interim Report, by the Council for Trade in Services in 1999, one year after the Work Programme's formation. The Progress Report identified various common understandings as solutions to the listed issues in

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[108] Ibid para 1.2.
[109] Ibid para 2.1 – 5.1.
[110] 'Exclusively for the purposes of the work programme, and without prejudice to its outcome, the term "electronic commerce" is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means,' op cit note 21.
[111] Ibid.
[112] The Council for Trade in Services' Progress Report to the General Council, The Council for Trade in Goods' Interim Review of Progress and The Committee for Trade and Development's Note Issued by the Secretariat will be examined.
[113] The Council for TRIPS' work shall not be considered as it is not as pertinent to the consideration at hand.
[114] Op cit note 106 para 2.1.

the Work Programme while recognizing which issues would need additional consideration in order to find such acceptable solutions.[115]

With respect to the scope of the GATS in relation to the electronic delivery of services, it was held that Article 1 did indeed apply to all services with delivery occurring under the four modes of supply,[116] although confusion arose in distinguishing certain modes.[117] There was a call for further clarification in terms of the arguments made asserting that all products that are delivered electronically can be classified as services. The disagreeing delegations identified instances where the electronic delivery of products would not be considered services, rendering other provisions applicable in place of the GATS.[118]

The Council for Trade in Services held that the GATS MFN obligation is applicable to the electronic supply of services, while acknowledging the complex role that 'likeness' may have in this regard.[119] While there are varying arguments to be made in terms of determining what is 'like' in any given context, there seemed to be a general consensus that 'likeness' does not require a certain mode of delivery - meaning an electronically delivered service may, in some instances, be 'like' a service delivered in a different way.[120]

The issue of developing country participation was largely addressed by the Council for Trade in Services by advocating for the implementation of Article IV of the GATS, furthering trade liberalisation and market access.[121] While reference was made to inadequate resources, delegations highlighted the need for substantial fiscal policies in support of electronic commerce.[122] The Council for Trade in Services lastly emphasised the work of UNCTAD and the Committee on Trade and Development in respect of promoting developing country participation and recommended that the various parties should make use of the progress these bodies have made, while

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[115] Progress Report to the General Council (S/L/74) para 1.
[116] Ibid para 4.
[117] Ibid.
[118] Ibid para 6.
[119] Ibid para 7-8.
[120] Ibid.
[121] Ibid para 10.
[122] Ibid.

suggesting that these bodies take the issue of internet infrastructure into consideration.[123]

The Council for Trade in Services aimed to respond to the issues involving customs duties and classification. It became clear that member states may wish to establish how customs duties could apply to services if they do, and how customs duties would apply to electronic services.[124] There was also, as a result of the lack of clarity on this point, disagreement regarding the future of the standstill on customs duties.[125]

On the issue of classification, it was observed above that the GATS does not differentiate between services provided electronically and services provided by other methods and that many products delivered electronically are essentially services.[126] However, despite this, there was uncertainty as to whether products, even if classified as services, would be subject to full MFN and national treatment requirements as well as the prohibition of quantitative restrictions.[127] While it was agreed that no product would fall outside the ambit of a WTO agreement, there was an interesting suggestion that some 'products' such as downloaded files may be neither a good nor a service in certain instances.[128] While this suggestion may be open for discussion, it was agreed and concluded that electronic commerce itself would create very few, if any, 'new' services in line with GATS and the Services Sectoral Classification List.[129]

4.2.2. The Council for Trade in Goods: Interim Review of Progress

The Council for Trade in Goods, in line with the GATT 1994 provisions, was similarly called upon to examine the various issues, to the extent they are related to electronic commerce.[130] The Council for Trade in Goods complied with the requirement of response[131] by way of submitting the Chairman's Summary of Discussions,[132] which

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[123] Ibid.
[124] Ibid para 22.
[125] Ibid para 23.
[126] Ibid para 24.
[127] Ibid para 25.
[128] Ibid.
[129] Ibid para 26.
[130] Market access, valuation issues in respect of Article VII, application issues in respect of the Agreement on Import Licensing Procedures, customs duties and other charges in line with Article II, the standards for electronic commerce, rules of origin issues and classification issues.
[131] Op cit note 106 para 1.2.
[132] Chairman's Summary of the Discussions held in the CTG (G/C/W/158).

would inform the Interim Review of Progress, encapsulating the relevant discussions of three informing meetings up until 1999, a year after the Work Programme's formation.

The delegations noted, from the outset, the difficulty in defining electronic commerce and further the innately evolving nature of this form of trade, rendering any concrete definition inadequate in time.[133] It was held, that the WTO provisions relating to goods would subsequently be relevant where an electronic transmission's content could be classified as a good.[134] However, as it was observed above in relation to the discussion on trade in services, many delegations support the idea that electronic transmissions are to be considered as services and not as goods - the GATS is 'technology neutral'[135] which appeals to many. It was even questioned in meetings if the content and supply of an electronic transmission could be separated, where the former would be a good and the latter a service.[136] It was concluded that these classifications would only be even more impractical to adhere to in practice than it is to conceptualize them in theory, which left the classification question largely unanswered and the actual value in the possible solution questioned.[137]

While the issue of the standstill agreement was raised again in respect of customs duties and other duties and charges, it was held that the prior agreement would not be detrimental to the progress of the Work Programme.[138] Despite the confusion that may exist between the understanding of the Council for Trade in Services report and the Council for Trade in Goods report, the latter seemed to conclude that goods would be subject to existing WTO rules for the trade in goods when they are physically delivered across border, even when the goods are sold online.[139]

The customs duties issues led to a more in-depth consideration of classification, in terms of the harmonised system, commonly referred to as the HS.[140] It is clear, that digitalization complicates various aspects of traditional classification and the Council for Trade in Goods may not be in the best position to examine the

[133] Ibid para 2.1.
[134] Ibid para 2.3.
[135] Ibid para 2.5.
[136] Ibid para 2.4.
[137] Ibid para 2.8 & 2.11.
[138] Ibid para 4.1.
[139] Ibid para 4.2.
[140] Ibid para 4.4.

issues to their full extent. In lieu of this, delegations took issue with the use of HS as it would not be applicable to the classification of electronic transmissions, if they are to be understood as services.[141] Further, if the HS' purpose was to collect the relevant custom duties, the standstill that is in place would render this purpose redundant.[142]

The issues relating to rules of origin were held to be dependent upon the outcome of many of the above-mentioned concerns, as rules of origin by nature aim to enforce various policies of trade.[143] Parties did, however, propose that the Agreement on Rules of Origin would perhaps apply if electronic transmissions were understood to constitute as goods. Despite the possible applicability of the Agreement, there were apprehensions towards using rules of origin as transmissions, generally, are not 'point-to-point transmissions.'[144] The 'fluidity' of electronic transmissions in general was once again raised as a prevailing factor and was described as 'the flow of constantly evolving pieces, of functionality, processing and communication.'[145]

It is generally accepted in international trade, that the rules and procedures that have been developed should not themselves act as further barriers to trade. This underlying goal was examined in light of standards in relation to electronic commerce.[146] Particular to electronic commerce, is the need for standards in respect of both the good (or service) and the actual form of the transfer.[147] The adequacy of such standards was found to correlate to and impact upon secondary issues such as flaws within standardization which allow for various groupings to form within the loopholes.[148] On the point of input from developing countries in standardization efforts it was heard that although the standards of the ISO and IEC were reached by consensus in respect of the TBT agreement, participation by developing countries and small and medium sized enterprises are essential to the system's functioning. Increased participation in the standardization process leads to 'interoperability, connectivity, and access to platforms for electronic commerce' for these parties specifically.[149]

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[141] Ibid para 5.1.
[142] Ibid para 5.3.
[143] Ibid para 7.1.
[144] Ibid para 7.5.
[145] Ibid para 7.3.
[146] Ibid para 8.1.
[147] Ibid.
[148] Ibid.
[149] Ibid.

An opposing view on the topic of standards in relation to electronic commerce held that regulation in the form of the above-mentioned standardization would not achieve its desired purpose and would hinder the actual development of e-commerce and the associated digital developments that perhaps have not been fully realised.[150] Consequentially, the two broadly competing arguments need to be taken into account when assessing the best approach to standardization in electronic commerce. While this point of contention forms a fundamental question of the existence and development of e-commerce in the global world, it was however concluded and accepted that the WTO and its divisions shall not be able to regulate e-commerce in its entirety and that the devised rules and regulations are to have a more general application and effect. As a result, the WTO should avoid setting such specific standards for electronic commerce.[151]

In respect of development, which shall be discussed at length in the following chapter, a delegation highlighted the need to consider developmental concerns in light of electronic commerce and particularly the impact the 'new' rules, regulations and systems may have on the more conventional forms of trading in these countries.[152] Yet again, there was a discussion on whether the continued growth of electronic commerce would indeed displace the status quo in such a negative way or whether the developments may, in fact, lead to further trade creation and potential prosperity for developing economies. Several issues that were deemed in need of further discussion carried great weight for developing countries.[153]

The Chairman of the Council for Trade in Goods noted, in conclusion, that many of the above-mentioned issues and concerns could only be discussed effectively once there had been clarification on the overarching issue of the nature of electronic transmissions – being whether they are services or goods or perhaps even something in-between.[154] The classification issue of electronic transmissions is a 'trade related issue(s) of cross-cutting nature'[155] which the General Council itself shall consider.

[150] Ibid para 8.2.
[151] Ibid.
[152] Ibid para 10.1.
[153] Ibid para 8.1.
[154] Ibid para 11.1.
[155] Ibid.

Nevertheless, the identified issues were to be continually discussed and reviewed by the Council for Trade in Goods.

4.2.3. The Committee for Trade and Development: A Note issued by the Secretariat

The Committee for Trade and Development, by nature, was tasked with an extensive list of issues concerning the developmental implications of electronic commerce and was to acknowledge the varying financial, developmental and trade needs of the developing countries.[156] A Note was issued by the Secretariat in 1998 to guide the Committee on Trade and Development with its discussions.[157] Once again, the identified list of issues was not intended to act as an exhaustive list but serves as a useful tool, particularly for our purpose, in starting the process of assessing the developmental impact electronic commerce has had over the years.

It is noted from the outset, that the mere access to the necessary telecommunication systems is, perhaps the 'defining element'[158] of electronic commerce. This is undoubtedly of great importance to developing countries and shall be explored in light of other developmental concerns present in electronic commerce. As with any new system, electronic commerce carries both potential benefits and plausible problems which need to be objectively assessed in order to formulate an advantageous way forward for these delegations.[159] The benefits are broadly obtained from the new technological advancements themselves alongside the interrelated developments, and the concerns are directly connected in a sense that there may exist 'physical, economic, juridical and policy constraints'[160] which deter such developing nations from taking advantage of the global technological developments. Knowledge, information and investment[161] are perhaps only the initial necessities required to establish oneself in the sphere of electronic commerce.

The Note states that electronic commerce may assume the position of a substitute[162] to traditional trade forms, as an addition[163] to the established structure, or

[156] Development Implication of Electronic Commerce (WT/COMTD/W/51) para 1.
[157] Ibid para 2.
[158] Ibid para 5.
[159] Ibid.
[160] Ibid para 6.
[161] Ibid.
[162] Ibid para 7.
[163] Ibid para 8.

as a complementary system[164] to the conventional approach. Understanding electronic commerce as an additional form may be valuable for developing countries in particular. Where countries are hampered by a lack of physical resources, adequate transport and financial restraints – electronic commerce has not only the potential but also an advantageous position in circumventing these issues to provide for new trade opportunities.[165] The listed examples by Secretariat on this point extend to 'trade in on-line education services, medical services, consulting services and databanks retrievals.'[166] Although appealing, it was held that electronic commerce cannot alleviate all the issues of the developing countries in the traditional form, specifically that of the supply capability of the developing country's domestic market.[167]

Following on from the general benefits of electronic commerce for developing countries, are the specific identified benefits for the consumers of such countries.[168] The digitized world naturally allows for information to become more accessible, meaning consumers would be able to gather information to accurately inform their purchases. With an increased availability and variety of products, competition will increase between producers and ultimately benefit consumers by the associated lowered costs.[169] Of particular importance to the consumers of developing countries may be the notion of reduced delivery costs. When compared to the products of developed countries, the cost in producing a developing country product is typically more heavily impacted by increased delivery costs.[170]

The Note identified similar benefits for developing country producers as the ones for the consumers which may prove specifically invaluable for small and medium size enterprises.[171] As many products may still require physical delivery, delivery services and other interrelated systems will benefit from the increased demand while creating further export growth.[172] The use of electronic commerce may also increase the competition for domestic producers as foreign companies may be able to utilize

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[164] Ibid para 9.
[165] Op cit note 163.
[166] Ibid.
[167] Ibid para 10.
[168] Ibid para 11-12.
[169] Ibid para 11.
[170] Ibid para 12.
[171] Ibid para 13-18.
[172] Ibid para 17.

the system to their benefit. Thus, developing countries are encouraged to 'prepare themselves'[173] for this eventuality.

Physical infrastructure requirements for conducting electronic commerce can be identified as, but are not limited to 'a well-functioning, modern telecommunication infrastructure and a satisfactory distribution of electricity,' as well as 'access to computer hardware, software and servers.'[174] There are naturally different spheres of electronic commerce that require varying systems and infrastructures. It was found, as expected, that developing countries lack much of the required infrastructure when compared to the structural capabilities of the more developed countries.[175] The same can be said when one compares the levels of accessibility.[176]

Related to the infrastructural requirements is the need to enhance the availability of such necessities. The Note observes the importance of capital investments[177] and the initial exorbitant costs that are involved. Policy factors[178] are identified as contributing factors in regulating and reducing the associated costs of accessing the internet and related technological developments.[179]

The human infrastructure requirements for electronic commerce are deemed to be different to those involved in other spheres of trade as the need for specific skills[180] will only increase as electronic commerce advances.[181] It is observed, that developing countries will inherently lack the required human infrastructure[182] which leads to a consideration of the resultant effects on education and training in the affected countries. From the outset, the effect of electronic commerce in the education sector is construed as positive not only in terms of the actual information but also in the facilitation of learning – as distance learning becomes a viable possibility.[183] Despite

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[173] Ibid para 18.
[174] Ibid para 19.
[175] Ibid para 22.
[176] Ibid para 24.
[177] Ibid para 28.
[178] Ibid para 29-30, examples of the policy factors are the implication of reduced customs duties and the incorporation of private competition into the market.
[179] Ibid para 29 – 32.
[180] Ibid para 33, these are relatively obvious and range from basic computer literacy to the maintenance of technological devices.
[181] Ibid.
[182] Ibid para 34.
[183] Ibid para 35.

the positive outlook, it is noted that the benefits will not be immediate and the need for access and 'extensive basic education'[184] will still be prerequisites.

The Note considers the effects of electronic commerce on employment in developing countries. Once again, developments in electronic commerce may act as a substitute and see a decline in employment opportunities in terms of the traditional forms of trade with an exception being employment in the delivery sector.[185] Accordingly, there would be an increase in the employment opportunities in the associated sectors of electronic commerce.[186] Of particular value to developing countries, may be the employment opportunities in the services sector.[187]

While the Note does not go as far as to say that electronic commerce would result in an automatic transfer of technology from developed to developing countries, it does hold that the participation will naturally result in a sharing of knowledge and technology.[188] When a developing country embraces these new developments, it is suggested that the economy would become more favourable to foreign investors as the typical curtailments, such as the mere physical distance, would be less deterring.[189] It is held further, that 'losses in government revenue should be considered in light of the gains that may arise.'[190] In conclusion it was observed, however, that most developing countries do not have regulatory frameworks in place to facilitate electronic commerce, as opposed to the developed countries who are more advanced in terms of their legislative structures.[191]

4.3. Ministerial Decisions on the Work Programme on Electronic Commerce

The Geneva Ministerial Conference in 1998 adopted the Declaration on Global Electronic Commerce, as participants recognized the potential of electronic commerce in international trade.[192] The Declaration, as it was stated previously, required the General Council to formulate the Work Programme. At each subsequent Ministerial

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[184] Ibid para 36.
[185] Ibid para 37.
[186] Ibid.
[187] Ibid para 38.
[188] Ibid para 41.
[189] Ibid para 42.
[190] Ibid para 44.
[191] Ibid para 48.
[192] Op cit note 105.

Conference, the General Council was required to periodically review the progress that had been made in respect of electronic commerce and report back at the next Ministerial Conference. Since 1988, Members have continuously agreed to uphold the current position in terms of not imposing customs duties on electronic transmissions.[193]

The Doha Ministerial Conference in 2001 was the fourth session of the WTO and the Ministerial Declaration took note of the need to develop the environment to facilitate further development in electronic commerce.[194] The Doha Ministerial Conference required the General Council to assess which bodies of the WTO may be in the best position to advance the progress of the Work Programme.[195]

The Hong Kong Ministerial Conference in 2005 aimed to further the development considerations of the Doha Work Programme by continuing the relevant negotiations.[196] In respect of electronic commerce, it was held that although the issues identified in the Work Programme had not yet been resolved, the Hong Kong Ministerial Conference agreed to strengthen it and the developmental concerns were mentioned specifically, albeit briefly.[197] The relationship between trade and technology was acknowledged, and the Ministers supported the need to facilitate an increase in technology in developing countries.[198]

The Geneva Ministerial Conference in 2009 held that the Work Programme's progress was a cause for concern as many of the identified issues had not yet been resolved.[199] The Geneva Ministerial Conference in 2011 repeated many of the previous aspirations in relation to electronic commerce and specifically called upon the General Council to focus on the development considerations. To achieve this, the Committee for Trade and Development was required to observe and evaluate 'development-related issues such as technical assistance, capacity building, and the facilitation of access to electronic commerce by micro, small and medium sized

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[193] The periodical review of the Work Programme and the standstill agreement were acknowledged from the Ministerial Conference in Geneva in 1998 to the Ministerial Conference in Buenos Aires in 2017.
[194] Doha Ministerial Declaration 2001 (WT/MIN(01)/DEC/1) para 34.
[195] The Work Programme's institutional arrangements were maintained.
[196] Hong Kong Ministerial Declaration 2005 (WT/MIN(05)/DEC) para 1-2.
[197] Ibid para 46.
[198] Ibid para 43.
[199] Geneva Ministerial Decision 2009 (WT/L/782).

enterprises, including small producers and suppliers, of developing countries and particularly of least-developed country Members.'[200]

The above was echoed yet again at the Bali Ministerial Conference in 2013 and the issues of internet access and connectivity where emphasised.[201] The Nairobi Ministerial Conference in 2015 aimed to continue with the developments under the Work Programme until the next meeting, which was the Buenos Aires Ministerial Conference in 2017.[202] While the Buenos Aires Ministerial Decision repeated the agreement to continue with the Work Programme, there were interesting developments regarding the possibility of launching new negotiations on the topic of e-commerce.[203] Although almost half of the participating delegations comprised of both developing and developed countries called for new negotiations on the subject,[204] certain delegations, most notably the African Group and India, did not consent to the idea and preferred to continue with the Work Programme of 1998. As a result, the countries in favour of renewing electronic commerce opted to begin with 'exploratory work'[205] that may aid future WTO negotiations on the subject.

4.4. Observations of the WTO work on electronic commerce

While the ability of the WTO to effectively adapt to modern technological developments may be critiqued,[206] there is still value in observing its position on e-commerce. At the very least, the WTO provisions and developments thus far can be interpreted as a point of departure for future negotiations on the topic of e-commerce. In addition to the above-mentioned work of the various WTO bodies in respect of the Work Programme, The General Council held periodic Dedicated Discussions which have seemed to consolidate the WTO bodies' observations ahead of the Ministerial Conferences and consider further country specific submissions.[207] It is clear that the various issues in electronic commerce were more effectively explored through using

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[200] Geneva Ministerial Decision 2011 (WT/L/843).
[201] Bali Ministerial Decision 2013 (WT/MIN/13/32).
[202] Nairobi Ministerial Decision 2015 (WT/MIN(15)/42) para 2.
[203] Buenos Aires Ministerial Decision 2017 (WT/MIN(17)/65).
[204] TRALAC 'WTO members submit proposals aimed at advancing exploratory e-commerce work' available at https://www.tralac.org/news/article/12964-wto-members-submit-proposals-aimed-at-advancing-exploratory-e-commerce-work.html, accessed on 21 August 2018.
[205] Buenos Aires Ministerial Conference, Joint Statement on Electronic Commerce 2017 (WT/MIN(17)/60).
[206] Op cit note 97, ICTSD at 2-3.
[207] As seen in the Report to the 21 November Meeting of the General Council (WT/GC/W/676).

the platforms of the Work Programme bodies, as opposed to the negotiations of the Ministerial Conferences.

Various issues, such as technical classifications of certain aspects of electronic commerce remain unresolved between the Council for Trade in Services, the Council for Trade in Goods and the Committee for Trade and Development.[208] While the bodies can be commended for identifying many of the related and interlinked considerations, the Work Programme's objective of finding acceptable solutions to the concerns has not fully materialised.[209]

In respect of the developmental concerns in electronic commerce, the work of the bodies should be viewed in light of the fact that the majority of the efforts were initiated in the late 1990's, when developing countries did not yet possess their increased bargaining power that they have gained over the years. Despite this, the Council for Trade in Services' approach to developing country participation, by promoting increased trade liberalisation and market access without considering the primary needs of developing countries, can be inherently critiqued from a developmental perspective and shall be elaborated upon in the following chapter.

The work of the WTO bodies highlights the possibilities and opportunities in electronic commerce for the developed and developing economies and holds, for the most part, that the benefits outweigh the associated risks and costs. An interesting observation of the Committee for Trade and Development, which is worth further consideration for our purpose, is the fact that electronically traded services, as opposed to goods, may circumvent some of the typical issues for developing nations. As developing country participation in the multilateral trading system has gradually increased over the years, culminating at the most recent Ministerial Conference of 2017 in Buenos Aires, it is now appropriate to consider their arguments and concerns, specifically of the African Group, relating to their participation in cross border electronic commerce.

[208] Op cit note 206.
[209] Ibid.

Chapter Five: DEVELOPING COUNTRY CONCERNS IN LIGHT OF THE DEVELOPMENT OF DIGITAL TRADE

5.1. Introduction

Developing countries have various concerns regarding their participation, or lack thereof, in digital trade. Where such nations are in a position to partake in global e-commerce, they remain apprehensive of the consequences of partaking in the digital form of trade as it shall be seen that the benefits may not be equally distributed. The concerns of the developing countries have a domestic and international dimension, where the internal consequences directly affect the relevant economy and the external fears relate to the capabilities of said economy to interact transnationally at a global level. The traditional barriers to trade are directly linked to the fundamental systems and infrastructures that are needed for a country to develop digitally whereas the latter apprehension reflects upon the role of developing countries in the multilateral trading system and the growth of their position globally.

These concerns shall be examined after establishing the developing countries' position in the multilateral trading system, as it is relevant to their apprehensions to the advancement of digital trade. The submissions of the African Group to the WTO will be examined as they encapsulate the above concerns and are a representation of the continent at a global, multilateral level.

5.2. The position of developing countries in the multilateral trading system

The WTO holds that it 'provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development.'[210] This has been critiqued, as there is a general consensus that developing countries' needs have not been adequately addressed by the multilateral trading system. Some would even go so far as to question whether the developing nations would be better off without such an institution that has benefited the developed and upper-middle income economies to their exclusion.[211] While the WTO's agenda exceeds the scope of this paper, it is relevant to briefly assess

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[210] WTO 'What is the WTO?' available at *https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm*, accessed on 14 January 2019.

[211] For example, see Fatoumata Jawara & Aileen Kwa *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* 2004.

the position of developing nations in the multilateral trading system and the growth that has occurred in recent years.

At the start of the Doha Round, developing countries remained concerned that the negotiation would focus on furthering trade liberalisation for the developed economies and not address the developmental issues that hindered their participation in international trade.[212] However, the Round became known as the Doha Development Agenda[213] and is a significant progression for the developing countries' position in the multilateral trading system. The improvements that have been made are certainly due to the formation of strong coalitions of developing nations – such as the G33, the African Group and NAMA 11 - that have been able to voice their various developmental concerns in the international negotiating sphere.[214] Regardless of the success of the Doha Development Agenda, the momentum of developing countries has evidently continued, based upon the African Group's representation at the Buenos Aires Ministerial Conference in 2017.

> Thus the current and future generation of developing country trade negotiators will become increasingly curious about the role that developing countries played in GATT since its inception. Re-discovering the history of GATT will become an essential part of their attempts to shape the future architecture and content of the multilateral trading system.[215]

The growth of the developing countries in the multilateral trading system, in both their representation and demands, is particularly relevant to the development of digital trade as they are able to contribute to the advancement at an important stage in the process, despite it being ten years since the initiation of the Work Programme.[216]

5.3. The traditional barriers to trade in the digital sphere

The developing countries apprehensions to digital trade are expectedly fairly obvious and are directly linked to their resource constraints and respective levels of development. While the new challenges of digital trade are significant, the traditional

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[212] Faizel Ismail 'Rediscovering the Role of Developing Countries in GATT before the Doha Round' (2008) 1 *The Law and Development Review* at 1-5.
[213] WTO 'The Doha Round' available at *https://www.wto.org/english/tratop_e/dda_e/dda_e.htm*, accessed on 14 January 2019.
[214] Op cit note 212 at 1-2.
[215] Ibid at 25.
[216] Op cit note 106, The Work Programme on Electronic Commerce, 1998.

barriers to trade remain the primary concern. The trade process can only be 'digitised' to a certain extent when dealing with tangible goods as they still require ordinary transportation. Physical barriers to trade between borders remain the biggest obstruction to effective importing and exporting, especially in Africa.[217] The physical restraints not only impede the basic facilitation of trade and access to markets but also increase the associated costs by preventing expeditious delivery.[218] Customs procedures, for both traditional and digital trade forms, are a related hindrance to the potential success of cross border trade in Africa.[219] Structural inefficiencies combined with frequent misconduct render the logistical issue the 'worst impediment' for various African countries with differing levels of development.[220]

The most fundamental requirement for digital trade is internet connectivity.[221] While smartphones have rapidly facilitated the access to internet across the world, it is the developing countries that remain somewhat 'unconnected' in comparison. This once again carries dire consequences for Africa in particular, as approximately only 12 percent of the population in sub-Sarahan Africa benefits from such access to the internet.[222] Once the tangible infrastructures have been established, software and other systems such a cloud computing would be required.

Where broadband connection is available, limited access to finance prevents many firms from accessing the online market and it is particularly felt by SMEs in the African context which corresponds with the broader issue of the 'global trade finance gap'[223] that has drastic consequences for the growth of an export market.[224] While financial technology itself can respond to the issue of trade finance to an extent,[225] developing nations would not yet be in a position to fully benefit from such a possibility.[226]

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[217] The World Bank 'De-Fragmenting Africa: Deeping Regional Trade Integration in Goods and Services' (2012) at 7-12.
[218] Op cit note 100, *Suominen* at 10.
[219] Ibid.
[220] Ibid, Kenya cited the issue as the worst while South Africa cited it as the second worst.
[221] Ibid at 8-9.
[222] See the World Bank's World Development Indicators, ibid at 9.
[223] Ibid at 10.
[224] Marc Auboin and Alisa DiCaprio 'Why Do Trade Finance Gaps Persist: And Does It Matter for Trade and Development?' (2017) *WTO Working Paper* at 3.
[225] Although it does not address the root of the problem, ibid at 24.
[226] Ibid.

It is clear that based on the above, the gains from digital trade would not be automatic for developing countries that lack the required infrastructures. This is somewhat at odds with the exponential growth that is innate to the process of digitization and leaves developing countries in a predicament as to how best to proceed in the realm of digital trade.

> While there are as yet no theoretical and econometric models to specify the components of an optimal enabling environment for trade as digitisation progresses, it is clear that none of these facets is sufficient on its own; rather, all are necessary for the digital economy to function.[227]

This leaves developing countries, and Africa as a continent, in a position where one has to navigate the inevitable development of digital trade without having the fundamental infrastructures in place to facilitate such advancement, hence the justifiable apprehensions. Even where the necessary arrangements exist, it shall be seen that success in digital trade is not guaranteed for these economies.

5.4. The potential of furthering the digital divide

The introduction of the digitised world may exacerbate the structural problems that exist and could potentially widen the 'gap' between the developing and the developed. This leads to the external fear of developing countries that increased participation in digital trade may have negative consequences for their socioeconomic development.

The notion of the 'second digital divide' is relevant, as it justifies the developing countries fears of not being able extract the benefits of digital trade like their developed counterparts in the global economy, even when they have the necessary infrastructures in place.[228] The 'second digital divide' refers to the 'difference in countries' abilities to leverage the internet for economic and social gains'[229] and it has been realised by a number of rising economies.[230] The *Networked Readiness Index* of the World Economic Forum[231] shows that while emerging markets may be connected and in a position to advance their digital transactions, the latter

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[227] Op cit note 100, *Suominen* at 2.
[228] Ibid at 9.
[229] Ibid.
[230] Ibid. For example, Poland, Bulgaria and Malaysia are but a few countries that have not realised the financial benefits of digital trade despite having the required infrastructures in place.
[231] Ibid.

rarely materialises due to a lack of skills, knowledge and training of personnel in ICT related fields.[232]

The potential regulation of digital trade is a theoretically challenging and complex task that was examined in the above chapter on the work of the WTO. It is clear, that even the most developed nations with progressive forms of digital trade still grapple with the fundamental concepts, as technology is redefining trade as we have come to understand it.[233] While the regulatory challenges may not be the most pressing concern for a developing nation, a basic facilitating framework would be needed to implement the system successfully. As digital trade progresses in a region, the need for efficient regulation would only increase.

The harmonisation of the governing set of rules is a multifaceted issue that shall be discussed in the following chapter in the context of regional integration. One again, the friction between conflicting regulatory systems and infrastructures for digital trade may not appear to be a major cause for concern for developing countries yet in time it would become a costly factor in impairing further development, especially in Africa.[234]

Connected to the general issue of regulation is the capability of a country to adequately address secondary considerations such as security concerns in the digital economy. Weak regulation, that does cater for the development of digital trade in its entirety, would leave a nation susceptible to threats that would further impair its development. The highlighted concerns are just a few considerations that may contribute to the notion of the digital divide at the initial stages of development and additional issues are likely to develop, as digital trade progresses.

5.5. The African Group’s submission at the WTO

The above concerns have been given international light by the African Group’s participation in the most recent WTO discussions surrounding the future of digital trade. The Work Programme on Electronic Commerce is the current governing framework and its contents were examined at length in the previous chapter. It was stated that there have been, however, calls for new discussions and negotiation on the

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[232] Ibid.
[233] Ibid at 3.
[234] Ibid at 11.

topic which culminated at the 11th Ministerial Conference held in December 2017 in Buenos Aires.

The new negotiations, advocated for by the majority of WTO members, would aim to deal with more nuanced issues relating to digital trade that have developed in recent years and would cover the topics of security, efficiency, liberalisation and consumer protection in the digital sphere.[235] While these issues have been broadly identified by the Work Programme for the most part, the new negotiations would be accelerated, specific and advanced in their approach. Such regulatory progress, achieved by consensus, would be in line with the developed nations' goals and reflect upon their growing capabilities in digital trade. It is therefore expected that the African Group, comprising of 43 WTO members from the region[236] and other similarly placed economies[237] would be apprehensive towards the proposed multilateral developments.

Furthering liberalisation in digital trade, a main goal of the new negotiations is somewhat controversial given the on-going concerns of the developing countries, who are not in a position to participate equally in global e-commerce. While development considerations have been factored into the proposed way forward it would be contradictory to promote the notion of liberalisation in the multilateral trading system once again, as it has not served the developing countries' interests thus far. Although the phrase is not used in their communications, the African Group's resistance stems from a fear of furthering the 'digital divide' as many African countries are unable to take advantage of digital development due to the lack of fundamental infrastructures, explained above. Thus, continuing the negotiations without being able to participate effectively in the system would only widen the gap,

[235] Ashley Hope and Puseletso Sauli 'Africa and the WTO E-Commerce Agenda' *Tralac* 19 January 2018, available at *https://www.tralac.org/discussions/article/12598-africa-and-the-wto-s-e-commerce-agenda.html*, accessed on 14 January 2019.

[236] See the African Group's membership as of December 2017 available at *https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm#grp002*, accessed on 14 January 2019.

[237] Bangaladesh, China, Costa Rica, India and Singapore were also less supportive of new negotiations. See ICTSD 'African Group Submits Proposal on E-commerce Ahead of WTO Ministerial' *Bridges Africa* 28 November 2017 available at *https://www.ictsd.org/bridges-news/bridges-africa/news/african-group-submits-proposal-on-e-commerce-ahead-of-wto*, accessed on 14 January 2019.

favour the dominant e-commerce players[238] and be contrary to the goal of developing digital trade sustainably.

Instead of entering into new negotiations on the topic, the African Group supports the continuation of the Work Program on Electronic Commerce.[239] The more fundamental issues that have remained largely unsolved, in their view, should be revised by the relevant committees of the Work Programme. The African Group have various other propositions advocating developmental concerns and emphasise the need to 'consider measures to promote national digital industrial development with a view to promoting inclusive, equitable and sustainable growth.'[240]

5.6. Conclusion

As a result of the discussions held at the 11th Ministerial Conference, it has been agreed that members shall continue operating under the current Work Programme and a select group shall begin to consider the development of a reformed set of regulations for the progression of digital trade.[241] While this does not oppose the requirement of consensus at the WTO as the status quo remains, it is a notable divide between the developed and the developing members. The African Group's stance is significant in highlighting the needs of developing nations in digital trade and reflects upon the growth of the developing countries' position in the multilateral trading system.

While the future of digital trade at the multilateral level is not clear cut for developing nations, the call for the abovementioned inherent capacity issues to be addressed by the African Group, before considering further trade liberalisation in the digital sphere, can be commended. It is essential that the primary concerns with respect to the traditional barriers to digital trade as well as the concerns relating to the possible furthering of the digital divide are adequately addressed, not only in the region's own development but also in the advancement of digital trade at the multilateral level.

Further, Africa's increased involvement in the WTO at a multilateral level results in one questioning which 'platform' might be most appropriate for the

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[238] Other nations, such as India, have also expressed concern over dominance in digital trade; op cit note 235.

[239] See the Statement by the African Group on the Work Programme on Electronic Commerce, op cit note 14.

[240] Op cit note 235.

[241] Ibid.

development of digital trade on the continent.[242] It is also necessary, particularly in the African context to consider how the progression of digital trade at the regional and global level would contribute to regional integration and the goal of continent-wide harmonisation.

[242] Ibid.

Chapter Six: DIGITAL TRADE IN THE CONTEXT OF REGIONAL INTEGRATION

6.1. Introduction

This chapter will place integration in Africa in its historical context before highlighting the relevance of regional integration to the development of digital trade on the continent. The hindrances to integration in Africa, in both theory and practice, will be examined in order to propose how the development of digital trade can compensate for the challenges that have been experienced. The appropriate platform for the development of digital trade, between the regional economic communities (RECs) and a continental FTA, shall be briefly considered ahead of the recommendations which will be made in the subsequent chapter.

6.2. Regional integration in Africa

Regional integration in Africa involves cooperation between countries, communities and organizations in order to improve their 'economic, political, social or cultural interaction'[243] in pursuit of the ideal pan-African continent. It can be said that regulatory integration efforts in Africa began in the 1970s with the Monrovia Symposium,[244] which highlighted the need for Africa to achieve a state of unified independence should it wish to improve its circumstances.[245] The subsequent Lagos Plan of Action and the Final Act of Lagos focused on 'collective autonomy' through regional cooperation.[246]

These initiatives, in turn, created the Abuja Treaty[247] which established the RECs as the building blocks of African integration and founded the African Economic Community (AEC) of 1994.[248] The latter treaty devised a six-stage plan which began with the reinforcement of the RECs and would have concluded with complete integration, characterised by the free movement of people and an African Monetary Fund. The Sirte Declaration[249] aimed to propel the implementation of the Abuja

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[243] Magaret Lee 'Regionalism in Africa: A Part of Problem or Part of Solution' (2002) 9 *CPSR* 1.
[244] Monrovia Symposium of 1979.
[245] Rene N'Guettia Kouassi 'The Itinerary of the African Integration Process: An Overview of the Historical Landmarks' (2007) 2 *African Integration Review* 1 at 2.
[246] Ibid at 4.
[247] Abuja Treaty, 1994.
[248] Op cit note 245 at 5-7.
[249] Sirte Declaration, 1999.

Treaty's plans and decided to establish an African Union. The Constitutive Act of the African Union[250] was a direct outcome of the Sirte Declaration and launched the African Union as we know it today, in May of 2001. The New Partnership for Africa's Development (NEPAD) accompanied the formation of the African Union as a support programme to enhance integration and was launched at the final OAU Summit in 2001.[251]

Africa has eight RECs – the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), the South African Development Community (SADC), and the Arab Magreb Union (UMA.)[252] While integration is not something that can be typically measured, the Africa Regional Integration Index[253] aims to assess the REC's progress in terms of trade integration, regional infrastructure, productive integration, free movement of people and financial and macroeconomic integration. Based upon this, the EAC has achieved the most success in their integration efforts although they are in an advantaged position, as the community already shared historical and cultural ties as well as a common language.[254] It should be noted, however, that the eight RECs have developed somewhat independently and do not have a shared agenda that was initially envisioned for them.

There is a general consensus that integration in Africa, for the most part, has failed. As seen above, the integration efforts have been characterised by numerous legislative attempts aiming to support and encourage integration between communities, yet this has not become a reality. Despite this, integration remains imperative to Africa's development which is evidenced by the most recent regulatory endeavours,[255] as the potential benefits of a unified Africa are significant.

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[250] Constitutive Act of the African Union, 2000.
[251] Op cit note 245 at 8.
[252] Op cit note 245 & 247.
[253] AFRICA Regional Integration Index 'Regional Economic Communities' available at *https://www.integrate-africa.org/rankings/regional-economic-communities/*, accessed on 20 December 2018.
[254] Ombeni B. Mwasha 'The Benefits of Economic Integration for Developing Countries in Africa: A Case of East African Community (EAC)' (2008) *Korean Review of International Studies* 69 at 70.
[255] For example, see AfCFTA (African Continental Free Trade Area).

6.3. The relevance of digital trade in regional integration

Regional integration considerations are relevant to the development of digital trade, and vice-versa, as they both aim to facilitate and promote cross-border transactions. The benefits of digital trade, such as the mere ease of transacting, would only further the existing integration objectives. It is therefore helpful to highlight the proposed benefits of regional integration in Africa specifically.

Africa is a large, fragmented continent with relatively small countries that are classified as developing, as opposed to developed nations. Based upon the geographical and socioeconomic statistics alone, integration and therefore digital trade are attractive options to minimise the consequences of the structural difficulties of the continent.

RECs normally aim to reduce the barriers to trade that may exist between their members. With less restrictions, trade between the respective members would typically increase which would in turn result in the general economic development of the region.[256] In order to benefit from the preferences available, the REC members would be encouraged to transact with each other as opposed to with parties outside the community. The continuous interaction between members would lead to the growth of the relevant markets and allow for the 'exploitation of economies of scale'[257] as resources, skills and knowledge can be shared. Competition would increase as companies and nations become more efficient in their transactions.[258] The success and further potential of the cross-border transactions within the community would attract investment opportunities from inside and outside the region.[259] As the level of integration within the community progresses, the likelihood of conflict, a particular challenge to Africa, would decrease.

Beyond the typical benefits of integration are the community specific ones that relate to their respective objectives that have developed over the years. The EAC, for example, have especially benefitted from their efforts in facilitating transportation services, communication infrastructures, employment rates, poverty alleviation,

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[256] Op cit note 254 at 71.
[257] Ibid.
[258] Ibid.
[259] Ibid.

preservation of the environment and international exposure.[260] It should be stated that many of the above-mentioned benefits have only been realised by the more successful RECs, such as the EAC. While the general benefits are extremely desirable for the continent as a whole, they are not predetermined in their entirety and would develop in line with the level of commitment to integration.[261]

While an integrated Africa would hold many benefits for its inhabitants, one must remain cognisant of the position the continent would have internationally should it present itself as a harmonised participant. The unified Africa would only increase its capabilities in operating and competing in the international sphere.[262] As the escalation of globalisation has presented its own set of benefits and challenges, it has become increasingly important for Africa to develop its stance in global activities.

The above-mentioned benefits of regional integration can be directly relevant, in application, to the development of digital trade. It is now established, that digital trade has the potential to facilitate trade at an exponential rate and contribute to the socioeconomic welfare of a community – which is echoed in the objectives of regional integration. What is particularly relevant to integration, is the ease with which digital trade can contribute to cross-border harmonisation, in theory and in practice. It is therefore only fitting, at least initially from a regulatory position, to consider the development of digital trade as a significant step in regional integration in Africa. Although the benefits of integration are essential to Africa's advancement, integration efforts have been met by several challenges – which are equally as relevant to the development of digital trade.

6.4. Challenges of regional integration in Africa

It is clear that integration on the African continent has been largely unsuccessful. While there are specific issues and challenges that have developed, it can be argued that Africa's downfall in integration is largely based upon the approach that has been taken by leaders, which can also be seen in the agreements.[263]

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[260] Ibid at 69, their objectives are set out in the EAC Establishment Treaty, 2002.
[261] Ibid at 70.
[262] Op cit note 245 at 2.
[263] See the various agreements establishing the regional economic communities.

The theories of regionalism are namely regional cooperation, market integration, development integration and regional integration.[264] While the specifics of the various theories are less relevant for our present purpose, it is necessary to highlight the general failure of market integration in Africa. Market integration involves the systematic removal of economic barriers between groups, where a formation such as a FTA would be established to reduce tariffs until complete economic integration is achieved whereby the parties are operating in a common market.[265] For the market integration to succeed like it has in EU, certain preconditions are needed such as the notion of perfect competition, no physical and structural barriers, sufficient resources and equally efficient trading parties.[266] As these are lacking in Africa, market integration, as a theory in isolation, has not achieved the desired level of economic prosperity.

The above realisation led to the adoption of the development integration theory which aims to apply the market integration theory in a somewhat different, and more suitable, way.[267] The development integration theory takes a step back and aims to stimulate the basic productive capacity of countries,[268] by 'conscious intervention by the regional partners to promote cooperation and interdependence.'[269] Cooperation, begins with political cooperation and this is the fundamental premise of this theory.

As this theory accounts for the inequitable distribution that occurs in implementing these reforms, unlike the market integration theory, the development integration theory aims to rectify this through compensation schemes (such as transfer tax systems and budgetary transfer) and corrective measures (such as funds and development banks) while promoting self-sustenance.[270] Unsurprisingly, the development model has been deemed to be structurally more complex, which has resulted in implementation problems as it is fundamentally based upon a deep-rooted

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[264] Op cit note 243 at 3.
[265] Ibid at 4.
[266] Ibid.
[267] T Ostergaard 'Classical Models of Regional Integration - What Relevance for Southern Africa?' in Bertil Oden (ed) *Southern Africa After Apartheid, Regional Integration and External resources* (1993) 27 at 33-34.
[268] Ibid.
[269] Ibid.
[270] Ibid; to do this, limits would be placed on foreign involvement. Further discussion on distributive measures can be found in Mutai KH (ed) Regionalism, Multilaterism and Free Trade – Theorectical Perspectives, Chapter 2 of *Compliance with International Trade Obligations The Common Market for Eastern and Southern Africa* (2007) at 37.

level of commitment that requires a nation to somewhat surrender its sovereignty for the benefit of all.[271]

There are several other challenges to regional integration that present as physical restraints as opposed to theoretical complexities and they have been experienced by the RECs and relevant organizations at varying degrees. The integration processes in Africa have been constrained by a general lack of resources such as infrastructure, funding and institutional competence.[272] As the continent is one that is prone to conflict in a climate of political instability, integration efforts have suffered in attempting to manage the consequences of such conflict.[273] The capacity problems have been exacerbated by the overarching issue of multiplicity of membership between the regional groupings, where countries in Africa typically belong to several RECs that have conflicting frameworks and varying objectives.[274] Thus, although the multiplicity of membership could be potentially beneficial in some aspects, it conflicts with the primary purpose of creating the RECS which was ultimately for continent-wide harmonisation.

Beyond the issue of multiplicity of membership, integration has suffered due to a lack of commitment from countries that do not see the advantage in somewhat trading political 'sovereignty' for the benefits of integration, where short term losses would lead to long term gains.[275] Further, the integration movement has not seen the involvement of all sectors – as the 'private sector and civil society'[276] have been absent. The fragmented participation may explain the issue of the 'unequal distribution of integration benefits'[277] that has been experienced, although this is arguably a more complex challenge that occurs when hegemons integrate with smaller economies in a developing region.[278]

The development of digital trade is once again relevant to the consideration of these challenges as it has the capability to reduce the effects of the restraining problems, to a significant extent. As the regulation of digital trade in Africa is still in

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[271] Ibid.
[272] Soumana Sako 'Challenges Facing Africa's Regional Economic Communities in Capacity Building' (2006) 5 *ACBF Occasional Paper* 1 at 5-6.
[273] Ibid.
[274] Ibid.
[275] Ibid at 5.
[276] Ibid.
[277] Ibid.
[278] Ibid.

its infancy, the regional groupings and larger organizations are in the unique position to circumvent the issue of multiplicity of membership, by formulating harmonious frameworks. Mere coordination, that is effective in implementation across the groupings, would not contribute further to the drastic consequences of 'poor design and inadequate sequencing of regional integration arrangements.'[279] The private sector can easily become involved in the development of digital trade, and thus in the integration movement, as the benefits are financially appealing. The internet provides civil society with the opportunity to participate in integration efforts as cultural and social indifferences would become less significant in the digital sphere.

6.5. The way forward for digital trade in Africa: RECs v CFTA

Digital trade has the potential to facilitate the benefits of integration while curbing the effects of the challenges presented by integration in Africa. While the development of digital trade cannot solve the challenges presented by regional integration in isolation, it is evident that it has the potential to make a positive contribution that would be welcomed after the general failure that has been experienced. Importantly, the development of digital trade can benefit from the efforts of integration in Africa and with such hindsight available, aim to be more successful. The remaining question, is to consider which platform may be the most suitable to advance digital trade in Africa which requires one to essentially compare the capabilities of the RECs discussed above, to a potential continental platform such as a digital FTA.

It could be argued that integration and development in respect of digital trade should be promoted at a continental level, as the efforts of the REC's have not developed into the envisioned pan-Africa. Therefore, in order to benefit from the previous integration attempts, a more realistic approach should be considered with continent wide momentum that is harmonised from the start. On the other hand, the RECs have achieved notable success in their integration efforts, albeit at varying levels.[280] Further, it is easier to formulate agreements within the smaller groupings which makes the endeavour of developing digital trade a more achievable goal. Although the RECs would benefit from their established system of cooperation, many

[279] Ibid.

[280] For example, compare the achievements of the EAC to CEN-SAD, op cit note 253.

of the above-mentioned challenges to integration would remain, such as the issue of multiplicity of membership.

While a formal proposition will be made in the subsequent concluding chapter, it is suggested that unified approach to the advancement of digital trade should be prioritised, whether developed within the regional grouping or at a continental level. Once again, the integration process poses the challenge of balancing the continent's needs with international developments. 'In essence, this means determining how regionalism and globalization can coexist and be conduits for, rather than hindrances to, growth and development in Africa.'[281] This challenge, is directly applicable to the development of digital trade and while the RECs should be encouraged to participate as the benefits would be in line with their objectives, it is essential that the development of digital trade be promoted at a continental level in order to facilitate both Africa's internal development and its external position in the international sphere.

[281] Op cit note 243 at 2.

Chapter Seven: CONCLUSION AND RECOMMENDATIONS

7.1. Introduction

This chapter will summarise the main observations that have been made, before proposing a way forward for Africa in its participation in digital trade. In concluding, this section will aim to answer the research objective and the related sub questions that were outlined in chapter one. The recommendations that follow will aim to respond to the challenges to digital trade that have been highlighted throughout the paper and will consider Africa's continental development as well as its position in the multilateral trading system. The two suggestions that will be put forward relate to the promotion of developing digital services as opposed to digitally traded goods and the potential use of the African Continental Free Trade Area (AfCFTA) as a platform for developing digital trade in Africa. As the proposed solutions will not be able to address the development of digital trade in its entirety, various considerations that would be essential to future development in Africa will be briefly highlighted for further research.

7.2. Summary

Chapter one highlighted the overarching research objective which was outlined as 'how can Africa develop a framework for digital trade in order to respond to the international technological advancements in trade while addressing the developmental challenges it faces as a continent?'[282] The question was preceded by an explanation of why digital trade is relevant to the consideration of development as evidence by MSMEs' integration into the digital economy.[283] The importance of the advancement of digital trade in Africa specifically was briefly considered as it informs the subsequent chapters.

Chapter two aimed to define concepts such as digital trade, e-commerce and free trade areas for goods and services in order to ascertain the limits, if any, of the development of digital trade. As definitions provide clarity, they are an essential consideration to the prospective regulation of digital trade. It was seen, however, that digital trade and e-commerce are complex concepts and previous attempts at

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[282] See section 1.2 above.
[283] See section 1.1 above.

describing them by various organizations have highlighted their limitless and evolving nature.[284] While FTAs benefit from multilateral regulation, the formation thereof is not a simple task as extensive negotiation would be required for the related rules of origin, alongside the other agreements. As a result, it was suggested that a broad and inclusive approach be preferred in defining digital trade and e-commerce respectively and that an FTA for services, as opposed to goods, be considered as the establishment thereof is more favourable for developing countries.[285]

Chapter three highlighted the impact of digitisation in the market as there has been a move from traditional forms of trade to digital trade. It is clear that the developments have been propelled by the fourth industrial revolution and that the progression of technology and digitisation has been exponential.[286] Internationally, companies such as Alibaba and Amazon have achieved great success in their e-commerce and related ventures while Naspers, Jumia and Kilimall have developed in Africa.[287]

It was seen that countries regulate digital trade in various different ways in order to facilitate digital growth. As of 2017, COMESA began implementing its plans for a Digital FTA – a first of its kind for Africa.[288] This is an important development, as African countries are typically classified as being 'digitally restrictive'[289] which prevents the continent from participating in this form of trade and thus cannot take advantage of the benefits. While there have been notable progressions in digital trade by the private sector, it is clear that from a cross-border regulatory perspective, Africa is far behind other continents – even those with predominantly developing nations.[290] This highlights the need to evaluate a way forward in this regard.

Chapter four examined the most significant regulatory steps taken by the WTO in respect of electronic commerce from 1998, when the Declaration on Global Electronic Commerce was adopted, to 2017 when the most recent Ministerial Conference was held in Buenos Aires. The platform of the Work Programme and its bodies have managed to assess digital trade more extensively than the negotiations of

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[284] See section 2.6 above.
[285] Ibid; see section 2.5 above.
[286] See section 3.2. above.
[287] Ibid.
[288] See section 3.3 above.
[289] See section 3.4 above.
[290] Ibid, see Figure 1 above.

the Ministerial Conference's.[291] The various issues that had developed from the Work Programme were addressed by the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS, and the Committee for Trade and Development respectively. While several identified issues remain unresolved and subsequent challenges have undoubtedly developed, it was established that digital trade is exceptionally complex and mere classifications present a challenge to regulatory negotiators.[292] Despite it being ten years later, there is value in reviewing the Work Programme's progress as it is the only regulatory platform for digital trade at the multilateral level.

From a developmental perspective, the Work Programme's trade liberalisation stance was critiqued as it does not cater for the developing nations' primary needs in order for them to participate in digital trade at an equitable level.[293] However, it was seen that the developing nations have gained an increased amount of bargaining power which was displayed at the most recent Ministerial Conference in Buenos Aires in 2017.[294]

Chapter five addressed the developmental concerns of the developing countries in relation to digital trade in greater detail. The position of developing nations in the multilateral was examined in order give context to the most recent developments - in particular the submissions of the African Group to the Ministerial Conference in Buenos Aires.[295] The concerns of the developing countries are twofold, as they face the on-going traditional barriers to trade in the digital sphere which prevent them from being able to participate as well as the threat of furthering the digital divide should they be able to partake.[296]

The fundamental issues relate to physical barriers at borders, customs procedures, internet connectivity, access to finance, structural inefficiencies and corruption. The structural problems may only be aggravated by the introduction of digital trade and negatively impact the countries' developmental objectives. Even where nations have the required infrastructures in place, it is a reality that developing

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[291] See section 4.4 above.
[292] See section 4.2.2 above.
[293] Op cit note 291.
[294] Ibid.
[295] Statement by the African Group on the Work Programme on Electronic Commerce, op cit note 14.
[296] See section 5.4 above.

countries may not benefit from such connectivity as they lack further skills and knowledge – which results in a second digital divide.[297] Challenges such as the regulation of digital trade, the harmonisation thereof and the ability to counter the negative consequences of a digital economy would not be seen as primary concerns, yet in time they would impair the progression of digital trade. These considerations resulted in the African Group preventing the establishment of new negotiations at the WTO which can be commended, as the developmental concerns of digital trade have not been adequately addressed.

Chapter six examined the advancement of digital trade in light of the correlation to regional integration, something that is particularly important to Africa's development. By outlining the regulatory steps that have been taken, it is evident that integration in Africa has not been particularly successful despite the abundance of facilitating frameworks.[298] Digital trade can therefore respond to the consequential challenges that have been faced, both in theory and in practice, and advance the proposed benefits of regional integration across the continent.[299] It was held that the way forward for the advancement of digital trade is not only crucial for socioeconomic development and the advancement of welfare in the continent but also for Africa's role in the international sphere which has been accelerated by the effects of globalisation.[300]

Despite the RECs' disappointment in not achieving the ideal of a pan-African continent, it was proposed that they should participate in the development of digital trade as the benefits would facilitate their own objectives, as demonstrated by COMESA's recent undertaking.[301] However, it was argued that it is essential that the development of digital trade be driven by continent-wide momentum and commitment and that the regulation thereof be harmonised through the use of a platform such as a continental digital FTA.[302]

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[297] Ibid.
[298] See section 6.2 above.
[299] See section 6.3 above.
[300] See section 6.5 above.
[301] The COMESA Digital FTA.
[302] Op cit note 300.

7.3. A way forward for Africa

7.3.1. Promoting digital services in Africa

It has been established that Africa is in somewhat of a predicament as to how to respond to the development of digital trade as the continent lacks much of the required infrastructure and does not have continent wide regulatory frameworks in place to facilitate the advancement of digital trade. As a solution to the challenges mentioned throughout this paper and in chapter five specifically, it is proposed here that the continent should consider the promotion of digital trade in services, as opposed to the digital trade in goods, for two reasons.

First, the digital trade in services can, to a certain extent, circumvent the infrastructural issues that Africa encounters when engaging in the digital sphere. While trade in digital services cannot respond to all the relevant concerns, it can alleviate the traditional barriers to trade that persist in the digital domain as services do not require physical transportation.[303] Thus, the physical obstructions, logistical difficulties and the issues of the related customs procedures at country borders, would not be relevant and therefore not pose as an issue in the development of digital trade across the continent.

Second, it is recommended that Africa should consider the formation of a digital FTA for services as opposed to goods, based on the above explanation of what the various FTA formations entail.[304] From a regulatory perspective, this supports the general proposition as a FTA for services caters for the position of developing countries not only in the formation thereof, but also in terms of the substantive requirements.[305] The informing provision requires that an FTA in services only eliminate the discriminatory measures, as opposed to the elimination of regulatory measures in their entirety which is required of an FTA in goods.[306] Further, developing countries that are parties to an FTA agreement in services, as opposed to goods, are granted flexibility in meeting the requirements, in line with the respective developing countries' sectoral and general level of development.[307]

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[303] This idea stems from an observation made in respect of the Committee for Trade and Development's Note issued by the Secretariat which proposed that electronically traded services, as opposed to goods, may circumvent some of the typical issues for developing nations.
[304] See section 2.4.1 compared to section 2.4.2.
[305] Ibid.
[306] Ibid.
[307] Ibid.

Beyond the above-mentioned motivations for Africa to consider digital trade in services, it is evident that the proposition is in line with international trade trends, of developing countries specifically.

> Growth of trade in services has vastly outpaced the growth of trade in goods in the past few years. For example, UNCTAD data show that, in 2015, trade in services grew at 5 percent, while trade in manufactured goods grew at 0.3 percent. Traditionally exporters of commodities and lower-end manufactured products, developing countries increased their exports of commercial services from 25 percent to 32 percent of global services exports in 2006–15 (World Trade Organization 2016).[308]

It could be argued, however, that despite the above development in trade Africa is not typically a continent that trades in services as their main export commodities are primary goods and natural resources.[309] Despite this, trade in services should be encouraged as it can also stimulate intra African trade and general diversification, something that trading in goods has not has much success in.[310] The lack of intra African trade and diversification is also a concern of the regional integration process as it is detrimental to the development of an African economy.

Trading in services would naturally develop as the process of industrialisation advances. There are a range of services, from various sectors such as banking and education, that can now be easily facilitated in the digital sphere. However, it is obvious that there would be basic prerequisites, such as internet connectivity, in order to facilitate the trading in digital services. While it is by no means a simple transition, the trading in digital services as opposed to goods, would be the 'easiest' way for the continent to immerse itself in the benefits of digital trade while remaining conscious of its developmental concerns and resource-constrained capabilities.

7.3.2. Using the AfCFTA as a platform to regulate the development of digital trade

It is essential that Africa considers its internal developmental agenda in navigating the way forward in digital trade as well as its external position in the multilateral trading

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[308] Op cit note 100, *Suominen* at 5.

[309] Gözde Isik 'Why regional integration is so important for resource-driven diversification in Africa' *The World Bank: The Trade Post* 15 April 2016, available at https://blogs.worldbank.org/trade/why-regional-integration-so-important-resource-driven-diversification-africa, accessed on 14 January 2019.

[310] Ibid.

system. Therefore, the proposed platform to regulate digital trade in Africa should be able to further both these objectives simultaneously. From an integration perspective, it has been established that having a unified system that is harmonious in application from its initiation would be highly beneficial.[311]

It was concluded in chapter six that while the work of the RECs should not be disregarded, such as COMESA's recent establishment of a digital FTA, it would be ideal to further the advancement of digital trade through the use of a continental FTA as it would avoid the issue of multiplicity of membership, amongst others, as digital trade progresses.[312] It is therefore appropriate to consider the African Continental Free Trade Area (AfCFTA) which was established in March 2018, as a potential platform for the advancement of digital trade.

The AfCFTA is a continent-wide FTA that can be understood as a 'comprehensive partnership agreement'[313] because it goes beyond the scope of a traditional free trade area for goods in order to further regulate related areas of trade, such as services, investment, competition and intellectual property.[314] It may be of particular significance to the smaller African countries as they will be able to access a single continental market which they would previously not have been in a position to benefit from.

> 'The main objectives of the AfCFTA are to create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of a continental customs union. It will also expand intra-African trade through better harmonization and coordination of trade liberalization and facilitation and instruments across the RECs and across Africa in general. The AfCFTA is also expected to enhance competitiveness at the industry and enterprise level through exploitation of opportunities for scale production, continental market access and better allocation of resources.'[315]

The preamble of the Agreement Establishing the African Continental Free Trade Area holds that the member states of the African Union established the AfCFTA

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[311] Op cit note 300.
[312] Ibid.
[313] Tralac 'African Continental Free Trade Area (AfCFTA) FAQS: Questions and Answers' available at *https://www.tralac.org/documents/resources/faqs/2019-african-continental-free-trade-area-faqs-june-2018-1/file.html*, accessed on 14 January 2019.
[314] Ibid.
[315] Tralac 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' available at *https://www.tralac.org/resources/by-region/cfta.html*, accessed on 14 January 2019.

in order to further the objectives of the Abuja Treaty, and in certain instances, the Marrakesh Agreement Establishing the World Trade Organization.[316] The latter inclusion displays a commitment to the consideration of international advancements at the multilateral level. While the AfCFTA aims to develop the economic standing of member states generally, it is held that it is also essential to the process of industrialisation[317] which is fundamental to the development of digital trade.

Based upon these factors, it is proposed that in the near future the AfCFTA may be the most appropriate platform to advance the development of digital trade. While digital trade has not been a priority in the negotiations thus far, is it becoming an important topic of consideration with regard to the future expansion of the AfCFTA. The inclusion of digital trade and e-commerce has been understood as a continuation of the phase II negotiations which shall cover the topics of competition, investment and intellectual property rights in early 2019.[318]

A publication of UNECA with contributions from ATRC, UNCTAD and the African Development Bank Group, due to be completed in February 2019, shall assess the above prospects and 'consider examples of regional policy approaches to digital trade with a view to identifying principles for an AfCFTA digital trade protocol that could aid the long-term development of Africa's e- commerce enterprises.'[319] It is suggested that an 'AfCFTA digital protocol' would address data regulations, ICT standards and interoperability, parcel distribution and e-commerce.[320] The publication unfortunately succeeds the present proposition but it shall undoubtedly provide further insight in the suitability of AfCFTA as the way forward for digital trade in Africa.

While the AfCFTA would regulate digital trade across the continent, it would also present a unified platform that can participate in the multilateral trading system as the AfCFTA has been well received by African heads of states thus far. When the AfCFTA was established, 44 out of 55 AU member states signed the founding agreement.[321] Five additional members states, including the previously absent South

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[316] Preamble of the Agreement Establishing the African Continental Free Trade Area, 2018.
[317] Op cit note 315.
[318] UNECA 'Concept Note: assessing Regional Integration in Africa IX: Next steps for the African Continental Free Trade Area' (2018).
[319] Ibid at 7.
[320] Ibid.
[321] Tralac 'Status of AfCFTA Ratification' available at *https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html*, accessed on 15 January.

Africa, have subsequently signed the Agreement bringing the number of signatories to 49 out of 55.[322] As 22 ratifications are required to bring the AfCFTA into force and there 18 to date,[323] the AU anticipates the enforcement of the AfCFTA within the coming months.

The general reception of the AfCFTA within the continent is promising as it holds great potential for furthering intra African trade and remedying the failures of integration that have been experienced thus far. The international support is encouraging as it may strengthen not only Africa's participation in international digital trade but also its representation at the multilateral level, as a continuation of the progress made at the Ministerial Conference in Buenos Aires. Should the establishment of the AfCFTA wish to address the challenges Africa has faced thus far, it needs to consider furthering Africa's capability of developing alongside the digital advancements in international trade while the agreement is its infancy.

7.4. Conclusion

The considerations relevant to the development of digital trade in Africa are extensive and have not been explored in their entirety yet it is clear that the developmental concerns need to be made a priority, at the regional, continental and multilateral level. Through observing the progress of the Work Programme on Electronic Commerce, it is seen that the multilateral regulation of digital trade is a complex task. Developing country participation at this level is essential to the sustainable development of digital trade, now more than ever, as the negotiations continue on the regulation thereof.

While the above propositions have aimed to address the developmental concerns of developing digital trade in Africa including the interlinked challenges of regional integration, there are other considerations that would be worthy of further research. Lack of access to trade finance is a restraint across all forms of trade and it is possible for digital trade to respond to this issue, to an extent, and cater for those that would previously not have been in a position to access such capital.[324] Digital trade also has the potential to facilitate the sharing of knowledge and make online

[322] Ibid, these figures reflect the status of the AfCFTA as of 15 January 2019.
[323] Ibid, this figure includes the ratification instruments deposited and pending.
[324] Alexander R. Malaket 'Digital Trade and Trade Financing: Embracing and Shaping the Transformation' (2016) *SWIFT*.

education, in various forms, easily accessible, which would advance a country's human resources and prevent the furthering of the second digital divide which would be of great benefit to developing regions. It is essential to the possible success of the development of digital trade in Africa, to continually advance these developmental considerations.

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